

DEPARTMENT OF LABOR AND INDUSTRY

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## Sub-Chapter 1

## Organizational Rules

24.9.101 ORGANIZATION OF THE HUMAN RIGHTS COMMISSION

(1) The human rights commission (commission) is established by 2-15-1706, MCA. The commission is composed of five members of the public appointed by the governor. The commission is allocated to the department of labor and industry (department) for administrative purposes only. The commission adopts rules separately.

(2) The commission is designated a quasi-judicial board for purposes of 2-15-1706, MCA. Its purpose is to uphold the laws of the state of Montana against discrimination.

(a) For complaints filed before July 1, 1997, the commission is responsible for investigating, conciliating and hearing the allegations of discrimination made in the complaint. These functions are delegated to the department of labor and industry, which acts on behalf of the commission. The commission hears objections to dismissals of complaints, hears exceptions to proposed orders issued after contested case hearings, and issues final orders.

(b) For complaints filed on or after July 1, 1997, the department is responsible for investigating, conciliating and hearing the allegations of discrimination made in the complaint. The commission hears objections to dismissals of complaints and hears appeals of final orders issued after contested case hearings. (History: 2-15-1706, 49-2-204 and 49-3-106, MCA; IMP, 2-4-201, 49-2-501 through 49-2-510, MCA; NEW, Eff. 1/2/77; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.102 RESPONSIBILITIES OF THE DEPARTMENT OF LABOR AND INDUSTRY

(1) For all complaints of discrimination filed before July 1, 1997, the commission has delegated the investigative function to the human rights bureau of the department of labor and industry. The commission has delegated the hearing function to the hearings bureau of the department of labor and industry, which issues proposed orders made final by order of the commission. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-201, 49-2-204 and 49-2-501 through 49-2-510, MCA; NEW, Eff. 1/2/77; AMD, 1995 MAR p. 2264, Eff. 10/27/95; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.103 COMMISSION MEETINGS: QUORUM; DECISION MAKING AUTHORITY

(1)(a) The commission shall meet upon call of the chairperson, or at the written request of at least three members, the time or place to be designated by the person calling the meeting.

(b) A majority of the membership constitutes a quorum to do business. A contested case in a case filed before July 1, 1997 may be heard before a hearing officer, an individual member of the commission acting as hearing officer, or by at least three members of the commission. The commission may designate one or more non-members to substitute for a commission member or members in the case of disqualification or other appropriate circumstances.

(c) The department shall provide a staff member to act as secretary of the commission. The staff member will keep general minutes of all commission meetings whether in person or by telephone conference call as a public record.

(2) A single commission member may issue an order in a contested case proceeding before the commission which is of a purely procedural nature. For example, a single member of the commission may sign an order regarding a briefing schedule, or an order extending the time in which a party may file exceptions when both parties stipulate that such may be done. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-201, 49-2-204, 49-2-205, 49-2-502, and 49-2-505, MCA; NEW, 1995 MAR p. 2264, Eff. 10/27/95; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.104 LIBERAL CONSTRUCTION; EFFECT OF PARTIAL INVALIDITY (1)

The following rules describe the procedure followed by the human rights commission in resolving complaints of discrimination.

(2) The commission will construe the provisions of the act, the code, and these rules liberally in all proceedings under them, with a view to effect their objects and to promote justice. A principle objective of the act and code is to assure that there will be no discrimination in certain areas of the lives of Montana citizens, except under the most limited of circumstances. Liberal construction of the act and code includes, without limitation, giving broad coverage and inclusive interpretation of the human rights statutes and rules to assure enforcement and protection of the state laws prohibiting discrimination.

(3) In construing the provisions of the act and code, the commission will refer to federal civil rights case law where it is both useful and appropriate and does not conflict with the purposes and intentions of state law.

(4) If a part of these rules is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of these rules is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid application or applications.

(5) Where errors of law or procedure do not cause prejudice to a party or deny a party a fair hearing or fundamental justice, they may be disregarded. Parties who assign error for the violation of any rule must demonstrate that a failure to comply with these rules is in fact prejudicial or constitutes prejudice as a matter of law.

(6) Where strict adherence to these rules would cause undue hardship or create a substantial injustice to a party, the commission may modify, waive, or excuse their application. The commission may not modify, waive, or excuse mandatory acts which are required by statute or due process of law.

(7) Parties who choose not to be represented by counsel and who represent themselves must substantially comply with the provisions of these rules, subject to the provisions of (6). The commission may modify the strict application of these rules to an unrepresented party to the extent they are not mandatory in order to assure fundamental fairness. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-205, 49-2-501, 49-2-504, 49-2-505, 49-3-304, 49-3-305, 49-3-307, and 49-3-308, MCA; NEW, 1995 MAR p. 2264, Eff. 10/27/95; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.105 DEFINITIONS The following definitions apply throughout this chapter:

(1) "The act" means the Human Rights Act, Title 49, chapter 2, MCA.

(2) "Charging party" means a person who files a complaint with the human rights bureau of the department of labor and industry (for complaints filed on or after July 1, 1997) or the human rights commission (for complaints filed before July 1, 1997) under 4-2-501, MCA.

(3) "The code" means the Governmental Code of Fair Practices, Title 49, chapter 3, MCA.

(4) "Commission" means the human rights commission as established by 2-15-1706, MCA.

(5) "Department" means the department of labor and industry.

(6) "Respondent" means any person against whom a complaint is filed.

(7) "Person" means a person as defined in 49-2-101, MCA.



(8) "Right to sue letter" means a document which terminates the jurisdiction of the department and commission over a complaint filed before July 1, 1997 under the act or code and allows a charging party or aggrieved person to file a discrimination action in district court.

(History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-101, 49-2-501, 49-2-509, 49-3-101, and 49-3-312, MCA; NEW, 1995 MAR p. 2264, Eff. 10/27/95; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

Rule 24.9.106 reserved

24.9.107 APPLICABILITY OF RULES (1) The administrative rules in this chapter apply to the disposition of complaints of discrimination as follows:

(a) For complaints filed before July 1, 1997, only the administrative rules in the following sub-chapters apply:

- (i) sub-chapters 1 through 4;
- (ii) sub-chapter 6;
- (iii) sub-chapter 8; and
- (iv) sub-chapters 10 through 15.

(b) For complaints filed on or after July 1, 1997, only the administrative rules in the following sub-chapters apply:

- (i) sub-chapter 1;
- (ii) sub-chapter 6;
- (iii) sub-chapter 8;
- (iv) sub-chapters 10 through 14; and
- (v) sub-chapter 17 (History: 49-2-204 and 49-3-106, MCA; IMP, Title 49, Chapters 2 and 3, MCA; NEW, 1998 MAR p. 3201, Eff. 12/4/98.)

## Sub-Chapter 2

## Investigation And Conciliation

24.9.201 LIBERAL CONSTRUCTION; EFFECT OF PARTIAL INVALIDITY (IS HEREBY REPEALED) (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-501, 49-2-504, 49-3-304, 49-3-305, 49-3-307, MCA; NEW, Eff. 1/2/77; AMD, 1987 MAR p. 1088, Eff. 7/17/87; REP, 1995 MAR p. 2264, Eff. 10/27/95.)

24.9.202 DEFINITIONS (IS HEREBY REPEALED) (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-101, 49-2-201, 49-2-509, 49-3-101, 49-3-312, MCA; AMD, 1989 MAR p. 487, Eff. 4/28/89; REP, 1995 MAR p. 2264, Eff. 10/27/95.)

24.9.203 PREHEARING PROCEDURE: INTRODUCTION (IS HEREBY REPEALED) (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-201, 49-2-501 through 49-2-505, MCA; NEW, Eff. 1/2/77; REP, 1987 MAR p. 1093, Eff. 7/17/87.)

24.9.203A SCOPE AND PURPOSE OF RULES (1) The rules in this sub-chapter describe the procedures followed by the department in investigating and conciliating complaints filed before July 1, 1997. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-504, MCA; NEW, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.204 COMPLAINT; WHO MAY FILE, TIMELINESS (IS HEREBY REPEALED) (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-501, 49-3-304, MCA; NEW, Eff. 1/2/77; AMD, 1987 MAR p. 1088, Eff. 7/17/87; AMD, 1995 MAR p. 2264, Eff. 10/27/95; REP, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.205 COMPLAINT; FILING CHARGE ON BEHALF OF AN AGGRIEVED PERSON (IS HEREBY REPEALED) (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-501, 49-3-304, MCA; NEW, Eff. 1/2/77; AMD, 1987 MAR p. 1088, Eff. 7/17/87; REP, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.206 COMMISSION STAFF COMPLAINTS; CLASS ACTIONS BY INDIVIDUALS OR GROUPS (IS HEREBY REPEALED) (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-501, 49-2-505, 49-3-304, 49-3-308, MCA; NEW, Eff. 1/2/77; AMD, 1982 MAR p. 1395, Eff. 7/16/82; AMD, 1987 MAR p. 1088, Eff. 7/17/87; AMD, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1995 MAR p. 2264, Eff. 10/27/95; REP, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.207 COMPLAINT; DATE OF FILING (IS HEREBY REPEALED)  
(History: 49-2-204, 49-3-106, MCA; IMP, 49-2-501, 49-3-304, MCA; NEW,  
Eff. 1/2/77; AMD, 1987 MAR p. 1088, Eff. 7/17/87; REP, 1998 MAR  
p. 3201, Eff. 12/4/98.)

24.9.208 COMPLAINT; CONTENTS (IS HEREBY REPEALED) (History:  
49-2-204, 49-3-106, MCA; IMP, 49-2-501, 49-3-305, MCA; NEW, Eff.  
1/2/77; AMD, 1987 MAR p. 1088, Eff. 7/17/87; REP, 1998 MAR p. 3201,  
Eff. 12/4/98.)

24.9.209 COMPLAINT; PLACE AND MANNER OF FILING, INSUFFICIENCY,  
EFFECTIVE DATE OF AMENDMENTS (IS HEREBY REPEALED) (History: 49-2-  
204, 49-3-106, MCA; IMP, 49-2-501, 49-3-304, 49-3-305, MCA; NEW,  
1/2/77; AMD, 1987 MAR p. 1087, Eff. 7/17/87; AMD, 1995 MAR p. 2264,  
Eff. 10/27/95; REP, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.210 AMENDMENT OF COMPLAINTS (1) A complaint may be amended to cure defects or omissions, including failure to swear or affirm that the charge is true, or to clarify and amplify allegations, to bring the charge up to date in regard to a continuing pattern of occurrences, to allege new but related matters or to allege additional facts directly relating to or growing out of the subject matter of the original complaint. A complaint may be amended at any time up to the time that the complaint is certified for hearing. The department shall promptly notify all parties in writing of any amendments. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-501, 49-2-503, 49-2-504, and 49-2-505, MCA; NEW, Eff. 1/2/77; AMD, 1987 MAR p. 1093, Eff. 7/17/87; AMD, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.211 RECEIPT OF INFORMATION BY COMMISSION (IS HEREBY REPEALED) (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-501, 49-2-502, 49-2-503, 49-2-504, 49-2-505, MCA; NEW, Eff. 1/2/77; REP, 1987 MAR p. 1093, Eff. 7/17/87.)

24.9.212 CONFIDENTIALITY (1) The department and commission will maintain the confidentiality of privacy interests entitled to protection by law. Any information which is made public may be altered to provide for the anonymity of persons whose privacy interests are entitled to protection by law.

(2) No complaint, information obtained in the investigation of a complaint, or other information in the department file will be made a matter of public information by the department prior to a finding under ARM 24.9.224 regarding cause to believe discrimination occurred or other agency action terminating investigation and entering an order with respect to a complaint. This rule does not limit the department's disclosures of such information to a party, individual, or agency as may be necessary to carry out the department's obligations under Montana statutes or these rules. The department may disclose any record or information contained in any record to any party, individual, or agency pursuant to a written request by or with the prior written consent of the individual to whom the record pertains.

(3) After a finding of reasonable cause or no reasonable cause or other agency action terminating the investigation in a case, the complaint, information obtained in the investigation of the complaint and other information in the department file which do not relate to privacy interests protected by law become public information.

(4) Disclosure of information regarding complaints alleging violations of federal law which are within the jurisdiction of the department and human rights commission because of worksharing arrangements with federal agencies may be further restricted by provisions of federal law.

(5) All settlement and conciliation agreements are public information except to the extent that they relate to privacy interests entitled to protection by law. A governmental entity does not have a privacy interest in any settlement or conciliation agreement.

(6) Information which is subject to the protection of Montana's constitutional right of privacy, Article 2, Section 10, which is requested or subpoenaed under the authority of 49-2-203, MCA, or these rules will not be disclosed to any individual, agency, or party outside the department or commission, except as required by law. The commission or hearing examiner may issue appropriate protective orders. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-504, 49-2-505, 49-3-307, and 49-3-308, MCA; NEW, Eff. 1/2/77; AMD, 1982 MAR p. 1395, Eff. 7/16/82; AMD, 1987 MAR p. 1088, Eff. 7/17/87; AMD, 1988 MAR p. 2308, Eff. 10/28/88; AMD, 1990 MAR p. 525, Eff. 3/16/90; AMD, 1995 MAR p. 2264, Eff. 10/27/95; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.213 COMPLAINT; WITHDRAWAL OF COMPLAINT BY CHARGING PARTY; REDESIGNATION OF COMPLAINT (1) Any person who has filed a complaint with the department or commission or any person on whose behalf a complaint has been filed may make a request in writing that the complaint be withdrawn. If the withdrawal is based on a private settlement, a copy of the settlement agreement must accompany the request.

(2) Upon receipt of a written request for withdrawal of the complaint, the department shall dismiss the complaint either entirely or insofar as it alleges a particular cause of action in favor of the party seeking the withdrawal or seeks an individual remedy for such party.

(3) The department may reserve any part of the complaint which alleges a cause of action in favor of any other person or group or may redesignate the complaint as a commission complaint with respect to any allegation or remedy which is not specific to the withdrawing party alone. Redesignation does not constitute the filing of a new complaint and relates back to the date the original complaint was filed. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-603, 49-2-504, and 49-3-307, MCA; NEW, Eff. 1/2/77; AMD, 1987 MAR p. 1088, Eff. 7/17/87; AMD, 1995 MAR p. 2264, Eff. 10/27/95; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.214 INTERVENTION (IS HEREBY REPEALED) (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-505, 49-3-308, MCA; NEW, Eff. 1/2/77; AMD, 1987 MAR p. 1088, Eff. 7/17/87; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.215 COMPLAINT; DEFERRAL FROM LOCAL, STATE OR FEDERAL AGENCIES (IS HEREBY REPEALED) (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-501, 49-2-502, 49-2-503, 49-2-504, 49-2-505, MCA; NEW, Eff. 1/2/77; REP, 1995 MAR p. 2264, Eff. 10/27/95.)

24.9.216 NOTICE OF FILING OF COMPLAINT (IS HEREBY REPEALED) (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-204, 49-3-307, MCA; NEW, Eff. 1/2/77; AMD, 1987 MAR p. 1088, Eff. 7/17/87; AMD, 1995 MAR p. 2264, Eff. 10/27/95; REP, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.217 COMPLAINT; NOTICE TO COMMISSION (IS HEREBY REPEALED) (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-502, 49-3-307, MCA; NEW, Eff. 1/2/77; AMD, 1981 MAR p. 801, Eff. 8/14/81; AMD, 1981 MAR p. 1615, Eff. 11/26/81; REP, 1995 MAR p. 2264, Eff. 10/27/95.)

24.9.218 COMPLAINT, COMMENCEMENT OF INVESTIGATION, MEDIATION

(1) As soon as possible after the complaint is received, it shall be assigned for investigation. The department may contact the charging party (and, in the case of a complaint filed on behalf of anyone, the persons alleged to be aggrieved) to ascertain the basis for the complaint and to inquire as to such additional facts and allegations as may be necessary to amend the complaint into its proper form and to make a determination whether the complaint is supported by substantial evidence. The department may also contact the respondent to obtain the viewpoint of the respondent, to ascertain additional facts, and to assure that the respondent understands the nature of the complaint and the requirements of the law. The department may also inquire into facts to determine whether the commission has jurisdiction over the complaint.

(2) The department may undertake efforts to achieve a voluntary resolution of the case through mediation with the parties. Any settlement of a case at any stage, whether mediated by the department or reached by the parties independently, is subject to the provisions of ARM 24.9.226. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-603, 49-2-504, and 49-3-307, MCA; NEW, Eff. 1/2/77; AMD, 1987 MAR p. 1088, Eff. 7/17/87; AMD, 1995 MAR p. 2264, Eff. 10/27/95; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.219 INVESTIGATION

(1) The department's investigation shall be conducted in a prompt and impartial manner. The department shall normally utilize methods such as written information requests and telephone interviews to obtain information in the course of the investigation, relying upon more formal investigative tools such as subpoenas and depositions only after attempts to achieve voluntary cooperation have been unsuccessful.

(2) The department, in investigating a charge of discrimination under the act, may exercise any and all of the powers of the commission provided for in 49-2-203, MCA. These include the power to subpoena witnesses, take the testimony of any person under oath, administer oaths, and require the production for examination of tangible evidence, such as documents, relating to the case. In exercising its powers, the department may issue subpoenas, take depositions, serve interrogatories, and require the production and disclosure of any tangible evidence.

(3) The powers of the department to conduct investigations are continuing from the time that a complaint is filed until the case is resolved, or a hearing on the complaint is held. The department may exercise its investigative powers in determining if a conciliation agreement is being honored or an order of the commission, issued after hearing, obeyed. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-203, 49-2-504, 49-2-506, 49-3-307, and 49-3-309, MCA; NEW, Eff. 1/2/77; AMD, 1987 MAR p. 1088, Eff. 7/17/87; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.220 EMERGENCY ORDER (1) After a complaint is filed, if it appears that substantial and irreparable damage to any charging party or aggrieved person will occur unless prompt action is taken, a member of the commission may petition the district court for an injunction for appropriate relief. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-503 and 49-3-306, MCA; NEW, Eff. 1/2/77; AMD, 1987 MAR p. 1088, Eff. 7/17/87; AMD, 1995 MAR p. 2264, Eff. 10/27/95; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.221 INVESTIGATION; FAILURE TO COOPERATE WITH INVESTIGATION

(1) If any person fails to comply with a request by the department for information, or fails to answer any interrogatory or question asked by deposition, or to produce any tangible evidence including any document related to a complaint under investigation by the department, the department may issue a subpoena, subpoena duces tecum, or other appropriate order requiring the person to supply the information, answer the interrogatory, respond to the question, appear and answer questions under oath, or provide the tangible evidence. If the order is not obeyed, the department may seek a court order enforcing the order.

(2) If a respondent has been given notice of a complaint and the department has requested information in the course of its investigation and respondent fails to answer the information requests within the time specified, the department may take one or more of the following actions to complete its investigative responsibilities:

(a) issue a subpoena, subpoena duces tecum or other appropriate order in accordance with (1) to compel the answering of the information requests, the production of documents, or testimony;



(b) in lieu of issuing a subpoena, issue a determination that the allegations of the complaint are supported by substantial evidence, engage in conciliation and, if unsuccessful, certify the case for contested case hearing where the results of the investigation although incomplete due to the conduct of the uncooperative respondent, are admissible as substantial evidence of discrimination;

(c) draw an adverse inference against respondent as to the evidence sought. Charging party may introduce such an adverse inference finding at the contested case hearing. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-203, 49-2-504, 49-2-505, 49-3-307, and 49-3-308, MCA; NEW, Eff. 1/2/77; AMD, 1987 MAR p. 1088, Eff. 7/17/87; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.222 INVESTIGATION; FAILURE OF CHARGING PARTY OR AGGRIEVED PERSON TO COOPERATE OR KEEP THE DEPARTMENT ADVISED OF CHANGES IN ADDRESS

(1) Whenever any charging party or (in the case of a complaint filed on behalf of anyone) any person alleged to be aggrieved shall refuse to comply with a request by the department for information or evidence reasonably necessary for the investigation, conciliation, or litigation of the complaint, the department may dismiss the case and issue a right to sue letter for failure of the charging party (or aggrieved person) to cooperate with the department, or may dismiss so much of the complaint as relates to that charging party or aggrieved person.

(2) Whenever any charging party or aggrieved person fails to advise the department of a change of address and the department is unable to locate the charging party or aggrieved person through reasonable efforts including a certified letter to the last address of record, the department may dismiss the case and issue a right to sue letter or may dismiss so much of the complaint as relates to that charging party or aggrieved person. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-504, 49-2-509, 49-3-307, and 49-3-312, MCA; AMD, 1989 MAR p. 487, Eff. 4/28/89; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.223 INVESTIGATION; FAILURE TO PRODUCE EVIDENCE

(1) No evidence concerning any matter which was the subject of a department information request which was not fully answered by either party during the investigation of the complaint shall be admitted in any contested hearing on a complaint in support of any position taken or defense made by that party. No document or other tangible evidence requested in connection with any interrogatory or motion for disclosure and production by the department which was not produced or which party denied existed or failed to disclose in response to the department's inquiry shall be admitted into evidence at any contested hearing on a complaint in support of any position taken or defense made by that party, nor shall evidence concerning the document or tangible evidence be admitted in support of the party's case.

(2) No testimony shall be permitted in support of any position taken or defense made by either party concerning the contents of any document or any other tangible evidence which was in the possession or control of a party and which, subsequent to the time that the party received notice of the filing of the complaint, was lost or destroyed or which was in the possession of any person and which was discarded or destroyed at the order or request of the party. The commission or hearing examiner may in the interests of justice waive this rule upon receiving the sworn testimony or affidavit of the respondent, the person who had custody of the document or other tangible evidence and the person responsible for its destruction, discarding or loss, concerning the circumstances of the loss or destruction. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-504, 49-2-505, 49-3-307, and 49-3-308, MCA; NEW, Eff. 1/2/77; AMD, 1987 MAR p. 1088, Eff. 7/17/87; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.224 INVESTIGATION; FINDING OF REASONABLE CAUSE OR NO REASONABLE CAUSE (1) At the conclusion of the investigation, the department will issue a finding of reasonable cause if the allegations of the complaint are supported by substantial evidence. The department will issue a finding of no reasonable cause if the allegations of the complaint are not supported by substantial evidence, or if the commission lacks jurisdiction over the complaint. The finding will include a brief statement of the reasons for the department's conclusions and will be mailed to all parties. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-504 and 49-3-307, MCA; NEW, Eff. 1/2/77; AMD, 1987 MAR p. 1088, Eff. 7/17/87; AMD, 1989 MAR p. 487, Eff. 4/28/89; AMD, 1995 MAR p. 2264, Eff. 10/27/95; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.225 PROCEDURE ON FINDING OF NO REASONABLE CAUSE

(1) A finding of no reasonable cause will be accompanied either by a dismissal order and right to sue letter in accordance with ARM 24.9.263 or by a notice certifying the case for a hearing in accordance with ARM 24.9.230.

(2) Any objection to a dismissal order and right to sue letter issued under (1) must be filed in accordance with the provisions of ARM 24.9.264. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-504, 49-2-505, 49-2-509, 49-3-307, 49-3-308, and 49-3-312, MCA; NEW, Eff. 1/2/77; AMD, 1982 MAR p. 1395, Eff. 7/16/82; AMD, 1983 MAR p. 857, Eff. 7/15/83; AMD, 1987 MAR p. 1088, Eff. 7/17/87; AMD, 1988 MAR p. 2308, Eff. 10/28/88; AMD, 1989 MAR p. 487, Eff. 4/28/89; AMD, 1990 MAR p. 525, Eff. 3/16/90; AMD, 1990 MAR p. 1561, Eff. 8/17/90; AMD, 1995 MAR p. 2264, Eff. 10/27/95; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.226 CONCILIATION AND SETTLEMENT (1) If the department issues a reasonable cause finding, it will attempt to resolve the case by conciliation. No statements made by any party in the course of a conciliation offer or in any oral or written discussion concerning conciliation will be admissible in any hearing held concerning the complaint. Agreement to a conciliated settlement of the case does not constitute an admission of violation of any law by the respondent.

(2) A conciliation or other settlement agreement reached by the parties prior to the time the case is certified for hearing must be in writing, signed by the parties, and approved by the department. A conciliation agreement or other settlement agreement reached by the parties after the case has been certified for hearing must be in writing, signed by the parties, and approved by the department and the commission.

(3) The department or commission may refuse to approve a conciliation or other settlement agreement which does not resolve all allegations or remedies for all persons or groups affected by the alleged discrimination. Alternatively, the department may treat the agreement as a withdrawal in accordance with ARM 24.9.213.

(4) A conciliation or other settlement agreement may be enforced by the department, the commission or by any party in the same manner as a final commission order by seeking appropriate orders in the district court pursuant to 49-2-508, MCA.

(5) A conciliation or other settlement agreement may include in its terms any remedy which could have been ordered by the commission after hearing. It may also include terms for monitoring compliance with the agreement.

(6) When a conciliated settlement does not appear possible following a finding of reasonable cause, the department shall inform all parties in writing that the conciliation period is concluded and certify the case for hearing.

(7) The parties must inform the department and the commission of all terms of any settlement entered into after the commission has issued a final order. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-504, 49-2-505, 49-3-307, and 49-3-308, MCA, NEW, Eff. 1/2/77; AMD, 1980 MAR p. 2196, Eff. 7/18/80; AMD, 1983 MAR p. 1833, Eff. 12/16/83; AMD, 1987 MAR p. 1088, Eff. 7/17/87; AMD, 1995 MAR p. 2264, Eff. 10/27/95; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.227 DISCOVERY (IS HEREBY REPEALED) (History: 49-2-505, 49-3-308, MCA; IMP, 2-4-602, 49-2-201(2), 49-2-504, 49-2-505, MCA; NEW, Eff. 1/2/77; AMD, 1980 MAR p. 2197, Eff. 7/18/80; AMD, 1982 MAR p. 1395, Eff. 7/16/82; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.228 ADOPTION OF MODEL RULES WITH AMENDMENTS (IS HEREBY REPEALED) (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-201, 2-4-202, MCA; NEW, Eff. 1/2/77; AMD, 1980 MAR p. 1134, Eff. 4/11/80; AMD, 1980 MAR p. 2198, Eff. 7/18/80; REP, 1987 MAR p. 1093, Eff. 7/17/87.)

24.9.229 CONTESTED CASES, PREAMBLE AND SUMMARY (IS HEREBY REPEALED) (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-201(2), 49-2-503, 49-2-504, 49-2-505, MCA; NEW, Eff. 1/2/77; AMD, 1982 MAR p. 1395, Eff. 7/16/82; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.230 CERTIFICATION OF A CASE FOR HEARING

(1) Whenever the department has issued a finding of reasonable cause and conciliation efforts have been unsuccessful, the department shall certify the case for hearing. In any other case, if the department determines that a hearing on a complaint is necessary as a matter of fundamental fairness, or in the public interest, the department may certify the case for hearing. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-505, 49-2-506, 49-3-308, and 49-3-312, MCA; NEW, Eff. 1/21/77; AMD, 1980 MAR p. 2198, Eff. 7/18/80; AMD, 1982 MAR p. 1395, Eff. 7/16/82; AMD, 1987 MAR p. 1088, Eff. 7/17/87; AMD, 1989 MAR p. 487, Eff. 4/28/89; AMD, 1995 MAR p. 2264, Eff. 10/27/95; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.231 NOTICE OF CERTIFICATION FOR HEARING (1) Notice that a case has been certified for hearing shall include:

(a) A statement indicating that the case has been certified for hearing;

(b) A statement indicating that the hearing examiner will set a time and place for hearing, and that the hearing will be held in the county where the discriminatory practice is alleged to have occurred, unless the respondent, the department or the commission requests a change of venue for good cause;

(c) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(d) A reference to the particular sections of the statutes and rules involved;

(e) A statement that a formal proceeding may be waived pursuant to 2-4-603, MCA;

(f) A statement advising the parties of their right to be represented by counsel at hearing;

(g) A statement that a hearing examiner has been appointed to conduct the hearing, if applicable.

(2) The department shall notify the parties of the certification for hearing.

(3) Notice that a complaint has been certified for hearing and the copy of the complaint shall be served on all parties in the manner provided in Rule 4D of the Montana Rules of Civil Procedure, Title 25, chapter 20, MCA. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-505, 49-3-308, and 49-3-312, MCA; NEW, Eff. 1/21/77; AMD, 1982 MAR p. 1395, Eff. 7/16/82; AMD, 1987 MAR p. 1088, Eff. 7/17/87; AMD, 1995 MAR p. 2264, Eff. 10/27/95; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.232 WHEN THE COMMISSION RECEIVES NOTICE FROM THE ADMINISTRATOR THAT A CASE IS NOW CERTIFIED FOR HEARING, THE COMMISSION SHALL DETERMINE TIME AND PLACE FOR HEARING (IS HEREBY REPEALED) (History: 2-15-1706, MCA; IMP, 49-2-201(2), 49-2-402, 49-2-505, MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.233 PRESENTATION OF CASE IN SUPPORT OF COMPLAINT (IS HEREBY REPEALED) (History: 2-15-1706, MCA; IMP, Sec. 49-2-201, 49-2-502, 49-2-505 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.234 ANSWER (IS HEREBY REPEALED) (History: Sec. 49-2-204 MCA; IMP, Sec. 49-2-505, MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.235 CONTESTED CASES; DEFAULT ORDER WHEN PARTY FAILS TO APPEAR AT HEARING (IS HEREBY REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-201, 49-2-205 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.236 CONTESTED CASES; INFORMAL DISPOSITION, PREHEARING CONFERENCE (IS HEREBY REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 2-4-603, 49-2-201, 49-2-502, 49-2-504 MCA; NEW, Eff. 1/2/77; AMD, 1979 MAR p. 1069, Eff. 9/14/79; AMD, 1980 MAR p. 1135, Eff. 4/11/80; AMD, 1980 MAR p. 2198, Eff. 7/18/80; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.237 CONTESTED CASES; APPLICATION FOR MORE DEFINITE AND DETAILED STATEMENT (IS HEREBY REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-401, 49-2-502, 49-2-505 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.238 CONTESTED CASES; SUBPOENAS (IS HEREBY REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-502, 49-2-201, 49-2-504, 49-2-505, 49-2-203 MCA; NEW, 1/2/77; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.239 CONTESTED CASES; HEARING EXAMINERS (IS HEREBY REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 2-4-104, 2-4-611, 2-4-612, 49-2-201, 49-2-502, 49-2-505 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.240 CONTESTED CASE; HEARING (IS HEREBY REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 2-4-612, 49-2-502, 49-2-505, 49-2-201 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.241 CONTESTED CASES; RECORD (IS HEREBY REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 2-4-614, 49-2-201, 49-2-502, 49-2-505 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.242 CONTESTED CASES; MOTIONS (IS HEREBY REPEALED)  
(History: 2-15-1706 MCA; IMP, Sec. 49-2-502, 49-2-201, 49-5-505 MCA; NEW, Eff. 1/2/77; AMD, 1982 MAR p. 1395, Eff. 7/16/82; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.243 CONTESTED CASES; EVIDENCE (IS HEREBY REPEALED)  
(History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-502, 49-2-201, 49-2-505 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.244 CONTESTED CASES; EX PARTE CONSULTATIONS (IS HEREBY REPEALED)  
(History: Sec. 2-15-1706 MCA; IMP, Sec. 2-4-612, 49-2-201, 49-2-502, 49-2-505 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.245 CONTESTED CASES; PROPOSED ORDERS (IS HEREBY REPEALED)  
(History: Sec. 2-15-1706 MCA; IMP, 49-2-201, 49-2-502, 49-2-504, 49-2-505 MCA; NEW, Eff. 1/2/77; AMD, 1979 MAR p. 659, Eff. 7/13/79; AMD, 1979 MAR p. 1069, Eff. 9/14/79; AMD, 1980 MAR p. 1135, Eff. 4/11/80; AMD, 1980 MAR p. 2198, Eff. 7/18/80; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.246 CONTESTED CASES; FINAL ORDERS (IS HEREBY REPEALED)  
(History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-201, 49-2-502, 49-2-505 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.247 CONTESTED CASES; NOTIFICATION OF ORDERS (IS HEREBY REPEALED)  
(History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-505, 49-2-506, 49-2-507 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.248 CONTESTED CASES; ENFORCEMENT ORDERS (IS HEREBY REPEALED)  
(History: Sec. 2-15-1706, MCA; IMP, Sec. 49-2-404, 49-2-508 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.249 DECLARATORY RULINGS AND MISCELLANEOUS PROVISIONS, PREAMBLE AND SUMMARY (IS HEREBY REPEALED)  
(History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-501, 49-2-502, 49-2-201, 49-3-503, 49-2-505 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 2308, Eff. 10/28/88.)

24.9.250 DECLARATORY RULINGS; INSTITUTION OF PROCEEDINGS (IS HEREBY REPEALED)  
(History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-501, 49-2-502, 49-2-201, 49-2-505 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 2308, Eff. 10/28/88.)

24.9.251 DECLARATORY RULINGS; CONTENT OF PETITION (IS HEREBY REPEALED)  
(History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-501, 49-3-502, 49-2-201, 49-2-505 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 2308, Eff. 10/28/88.)

24.9.252 DECLARATORY RULINGS; FILING AND NOTIFICATION OF DISPOSITION OF PETITION (IS HEREBY REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-501, 49-2-502, 49-2-201, 49-2-505 MCA; NEW, Eff. 1/2/77; AMD, 1981 MAR p. 803, Eff. 8/14/81; AMD, 1981 MAR p. 1616, Eff. 11/26/81; REP, 1988 MAR p. 2308, Eff. 10/28/88.)

24.9.253 DECLARATORY RULINGS; NOTICE OF HEARING (IS HEREBY REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-201, 49-2-501, 49-2-502, 49-2-505 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 2308, Eff. 10/28/88.)

24.9.254 DECLARATORY RULING; CONDUCT OF HEARING (IS HEREBY REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-201, 49-2-501, 49-2-505, 49-2-506 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 2308, Eff. 10/28/88.)

24.9.255 DECLARATORY RULING; EFFECT OF RULING (IS HEREBY REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-201, 49-2-501, 49-2-502, 49-2-505 MCA; NEW, Eff. 1/2/77; AMD, 1981 11/26/81; REP, 1988 MAR p. 2308, Eff. 10/28/88.)

24.9.256 MISCELLANEOUS PROVISION; SUBPOENAS AND ENFORCEMENT (IS HEREBY REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-201, 49-2-203, 49-2-501, 49-2-502, 49-2-505 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 2308, Eff. 10/28/88.)

24.9.257 MISCELLANEOUS PROVISIONS; REPRESENTATION (IS HEREBY REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 2-4-104, 2-4-602, 49-2-201, 49-2-502, 49-2-505 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 2308, Eff. 10/28/88.)

24.9.258 MISCELLANEOUS PROVISIONS; SERVICE (IS HEREBY REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 2-4-106, 49-2-201, 49-2-501, 49-2-502, 49-2-505 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 2308, Eff. 10/28/88.)

24.9.259 MISCELLANEOUS PROVISIONS: AVAILABILITY OF FINAL ORDERS AND DECISIONS (IS HEREBY REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 2-4-623, 49-2-201, 49-2-505 MCA; NEW, Eff. 1/2/77; REP, 1988 MAR p. 2308, Eff. 10/28/88.)

24.9.260 TIME FOR REVIEW OF HEARING EXAMINER DECISIONS (IS HEREBY REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 2-4-302 MCA; NEW, 1980 MAR p. 1710, Eff. 6/27/80; AMD, 1983 MAR p. 351, Eff. 4/29/83; REP, 1988 MAR p. 2308, Eff. 10/28/88.)



24.9.261 DISMISSAL OF COMPLAINT ALSO PENDING IN COURT

(1) At any time after a complaint is filed, any party to the complaint, or the department, may move the commission to dismiss the complaint on the grounds that the issues therein are also before a court of competent jurisdiction, either state or federal. The commission may dismiss the complaint without prejudice if it finds that the parties and issues before the commission are also before a court of competent jurisdiction, and that the court's decision will be determinative of the issues before the commission.

(2) If the court later finds that it does not have jurisdiction over the above described parties or issues, then the charging party or department may apply to reopen the complaint before the commission. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-204, 49-2-501, and 49-2-505, MCA; NEW, 1981 MAR p. 1619, Eff. 11/26/81; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.262 ISSUANCE OF RIGHT TO SUE LETTER (IS HEREBY REPEALED)

(History: 2-15-1706, 49-2-204, 49-3-106, MCA; IMP, 49-2-509, 49-3-312, MCA; NEW, 1983 MAR p. 857, Eff. 7/15/83; REP, 1989 MAR p. 487, Eff. 4/28/89.)

24.9.262A ISSUANCE OF RIGHT TO SUE LETTER WHEN REQUESTED BY A PARTY

(1) At the request of any party to a case before the commission, other than a case alleging a violation of 49-2-305, MCA (housing discrimination), the department shall issue a right to sue letter if the commission has not yet held a contested case hearing and 12 months have elapsed since the complaint was filed, unless:

(a) the party requesting the issuance of the right to sue letter has failed to comply with the terms of a lawful subpoena issued during investigation;

(b) the party requesting the issuance of the right to sue letter has waived the right to request removal either by specific written waiver or by conduct constituting an implied waiver;

(c) the party requesting the issuance of the right to sue letter has filed the request more than 30 days after service of the notice of certification for hearing on that party, and the commission or its hearing examiner has scheduled a hearing to be held within 90 days of the date of service of the notice of certification for hearing on the requesting party; or

(d) the party requesting the issuance of a right to sue letter has unsuccessfully attempted through court litigation to prevent the department from investigating the complaint.

(2) A party who requests issuance of a right to sue letter and is dissatisfied with a decision of the department refusing to issue a right to sue letter under (1) may seek commission review of the decision by filing or mailing written objections within 14 days after the decision is served. The date of mailing will be established by U. S. postal service postmark. Briefs are not required. A party who files such an objection and wishes to file a supporting brief must file and serve an original and six copies of the brief within five days of filing or mailing the objection. Any opposing party who wishes to file an answer brief must file and serve an original and six copies of the brief within ten days of service of the initial brief. A party making an objection who wishes to file a reply brief must file and serve an original and six copies of the brief within ten days of service of an answer brief. If a party making an objection does not file a supporting brief, any opposing party may request permission from the department to file a brief in opposition to the objection. The objection will be considered at the next commission meeting after conclusion of the briefing schedule. Consideration of the objection will be based upon the written record unless oral argument is requested and authorized by the commission.

(3) Briefs on objections to the department's failure to issue a right to sue letter may not exceed ten pages in length. Each party should provide copies of any specific exhibits from the record which the party deems essential for the commission to read. Requests for oral argument must be made in writing at the time of filing the first brief of each party. If the request is contained in a brief, the caption should indicate that oral argument is requested. If a request for oral argument is timely made, ten minutes for each party will be reserved for oral argument during the commission meeting at which the objection will be considered.

(4) If the commission sustains the objections to the refusal to issue a right to sue letter, it will direct the department to issue a right to sue letter. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-509 and 49-3-312, MCA; NEW, 1989 MAR p. 487, Eff. 4/28/89; AMD, 1990 MAR p. 1561, Eff. 8/17/90; AMD, 1995 MAR p. 2264, Eff. 10/27/95; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.263 CONTENTS OF RIGHT TO SUE LETTER (1) This rule applies when the department issues a right to sue letter pursuant to ARM 24.9.222, 24.9.225, or 24.9.262A.

(2) Each right to sue letter issued by the department shall be issued to the charging party and shall set forth the following information:

(a) A statement of the reasons for issuance.

(b) A notice informing the charging party that in order to pursue the complaint of discrimination, the charging party must petition the district court in the district in which the alleged violation occurred for appropriate relief within 90 days of receipt of the letter. The notice shall conspicuously state that if the charging party fails to file a petition in district court within the 90-day period, the claim shall be barred.

(c) A notice informing the charging party of the court's discretion to award attorney's fees to the prevailing party in a discrimination action in district court.

(d) A notice informing the charging party of the effect of the issuance of the right to sue letter as provided in ARM 24.9.264.

(e) A statement certifying that the requirements for issuance of a right to sue letter have been satisfied.

(3) The respondent shall be notified of the issuance of the right to sue letter by first class mail or hand delivery.

(4) The right to sue letter shall be served upon the charging party either by hand delivery or by certified mail. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-509 and 49-3-312, MCA; NEW, 1983 MAR p. 857, Eff. 7/15/83; AMD, 1989 MAR p. 487, Eff. 4/28/89; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.264 EFFECT OF ISSUANCE OF RIGHT TO SUE LETTER

(1) The issuance of a right to sue letter pursuant to ARM 24.9.222, 24.9.225, or 24.9.262A shall constitute the completion of the administrative process with regard to any complaint of discrimination in which a right to sue letter is issued.

(2) A party who is dissatisfied with a decision to issue a right to sue letter may seek commission review of the decision by filing or mailing a written objection within 14 days after the decision is served. The date of mailing will be established by U. S. postal service postmark. Briefs are not required. A party who makes an objection and wishes to file a supporting brief must file and serve an original and six copies of the brief within five days of filing or mailing the objection. Any opposing party who wishes to file an answer brief must file and serve an original and six copies of the brief within ten days of service of the initial brief. A party making an objection who wishes to file a reply brief must file and serve an original and six copies of the brief within ten days of service of an answer brief. If a party making an objection does not file a supporting brief, any opposing party may request permission from the department to file a brief in opposition to the objection. The objection will be considered at the next commission meeting after conclusion of the briefing schedule. Consideration of the objection will be based upon the written record unless oral argument is requested and authorized by the commission.

(3) Briefs on objections to the issuance of a right to sue letter may not exceed ten pages in length. Each party's brief should provide copies of any specific exhibits from the record which the party believes are essential for the commission to read. Requests for oral argument must be made in writing at the time of filing the first brief of each party. If the request is contained in a brief, the caption should indicate that oral argument is requested. If a request for oral argument is timely made, ten minutes for each party will be reserved for oral argument during the commission meeting at which the objection will be considered.

(4) If the commission sustains the objections to the issuance of a right to sue letter, it will reopen the case before the commission by remanding the case to the department for further investigation or to be certified for hearing.

(5) If the commission affirms the issuance of the right to sue letter, it will notify the parties of its decision in writing. The complainant will have 90 days after receipt of the commission's order affirming the issuance of the right to sue letter to petition the district court for appropriate relief.

(6) If the court later finds that it does not have jurisdiction over the case in which the right to sue letter was issued because of the improper issuance of the letter, then the charging party may apply to reopen the complaint before the commission. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-509 and 49-3-312, MCA; NEW, 1983 MAR p. 857, Eff. 7/15/83; AMD, 1989 MAR p. 487, Eff. 4/28/89; AMD, 1990 MAR p. 1561, Eff. 8/17/90; AMD, 1995 MAR p. 2264, Eff. 10/27/95; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.265 DOCUMENT FORMAT, FILING, SERVICE AND TIME

(1) The format of all documents filed with the commission and served on opposing parties pursuant to ARM 24.9.225, 24.9.261, 24.9.262A and 24.9.264 and the procedures and timelines for filing and serving all such documents shall be as provided in ARM 24.9.314 and 24.9.315, unless otherwise provided. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-106, 49-2-504, 49-2-509, 49-3-307, 49-3-312, MCA; NEW, 1991 MAR p. 308, Eff. 3/15/91.)

## Sub-Chapter 3

## Contested Case Hearing

24.9.301 PURPOSE AND SCOPE OF RULES (1) ARM 24.9.301 through 24.9.331 contain rules of procedure for contested case proceedings before the human rights commission for all complaints filed before July 1, 1997.

(2) The commission will give liberal construction to the rules to effectuate the purposes of the human rights statutes of Montana within the commission's jurisdiction. "Liberal construction" means, without limitation, giving broad coverage and inclusive interpretation to human rights statutes and rules to assure enforcement and protection of the rights secured by them.

(3) The commission or a hearing examiner may suspend, waive or modify these rules for good cause to expedite decision, prevent manifest prejudice to a party, assure a fair hearing, or afford substantial justice. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-505 and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.302 DEFINITIONS RELATING TO CONTESTED CASES As used in this sub-chapter, the following definitions apply:

(1) "Contested case" means a proceeding before the commission to determine the legal rights, duties, or privileges of a party following an opportunity for hearing. Contested case proceedings commence only following the completion of investigation by the department and, in cases in which the department finds that the allegations of the complaint are supported by substantial evidence ("reasonable cause"), following the conclusion of the department's efforts to resolve the complaint and eliminate the discriminatory practice through conference, conciliation, and persuasion.

(2) "Ex parte consultation" means the act of a party to a contested case, any employee of the department, any person having an interest in the outcome of a contested case or any other person not authorized by law, communicating with a hearing examiner or member of the commission regarding the merits of any contested case. Communications which do not constitute discussions or information regarding an issue of fact or law in a contested case, such as discussions of enlargements of time, scheduling, administrative matters or questions of procedure do not constitute ex parte communications.

(3) "Hearing examiner" means an individual appointed by the hearings bureau of the department of labor and industry to preside over contested case hearings and to make proposed orders for consideration by the commission. That individual may be either a person assigned with due regard for his or her expertise or a member of the commission acting in that capacity. When the term is used in these rules, it also refers to the chair of the commission or a presiding officer for purposes of contested case hearings conducted before the commission, sitting as a body.

(4) "Person" includes natural persons, individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated entities, employers, employees, employment agencies, labor organizations, and such other natural persons or entities, including artificial persons, possessing such status as a matter of law. The definition includes any group, organization, entity or natural person who is "aggrieved" within the meaning of ARM 24.9.204.

(History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-611, 2-15-1706, 49-2-101, 49-2-201, 49-2-505, 49-3-101, and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.303 JURISDICTION TO CONSIDER JURISDICTION (1) The commission and the department's hearing examiners shall, at all times, have jurisdiction to determine the jurisdiction of the commission over any particular contested case. In such situations the rules of procedure of the commission shall apply, and questions of jurisdiction may be resolved by rulings and orders based upon the pleadings or after a hearing, as required to suit the circumstances of the case. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-505 and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.304 INCORPORATION OF OTHER PROCEDURAL RULES BY REFERENCE (1) To the extent these rules do not provide for or specify procedures, or where necessary to supplement these rules, the department and commission may apply the provisions of the Montana Administrative Procedure Act, Montana Rules of Civil Procedure, Montana Uniform District Court Rules or Montana Rules of Evidence. Those procedural provisions are applicable to the extent they may clarify fair procedures, expedite determinations, and assist in the adjudication of rights, duties or privileges of parties before the commission. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-612, 49-2-505, and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.305 PRESENTATION OF A CASE IN SUPPORT OF A COMPLAINT

(1) All parties before the commission have the right to be represented by an attorney of their choice. Except as provided in ARM 24.9.1507, the commission will not provide counsel for parties or provide funds for the payment of counsel or legal representation.

(2) The department may appear in any contested case for limited or special purposes to represent the interests of the commission or the public. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-505, 49-2-510, and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.306 APPOINTMENT AND AUTHORITY OF HEARING EXAMINER

(1) Contested cases will be presided over and heard by a hearing examiner, who may be an individual appointed by the hearings bureau of the department of labor and industry, any individual appointed by the commission or an individual member of the commission.

(2) The hearing examiner has general authority to regulate the course of contested cases, and may exercise those powers and authority provided by 2-4-611, MCA, including all powers and authority provided or implied by law.

(3) The hearing examiner may establish prehearing and hearing dates and procedures, rule upon procedural petitions and motions, make procedural rulings and orders which appear necessary from the record, make proposed orders for commission review, and otherwise regulate the conduct and adjudication of contested cases as provided by law.

(4) No ruling, order, decision or exercise of the power and authority of a hearing examiner is reviewable by the commission prior to the entry of a proposed order, except as otherwise provided in these rules or unless a manifest and irreparable injustice would result.

(5) The jurisdiction and authority of a hearing examiner terminates upon the entry of a proposed order unless the commission further delegates authority for other proceedings or exercise of authority. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-611, 49-2-505, and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)



24.9.307 DISQUALIFICATION OF A HEARING EXAMINER OR MEMBER OF THE COMMISSION (1) A party may disqualify a hearing examiner from presiding over any matter governed by these rules only upon an affirmative showing, made in good faith, of personal bias, a lack of independence, disqualification by law or other ground for disqualification allowed by law.

(2) A party seeking to disqualify a hearing examiner may do so only upon the filing of a motion which is supported by a sufficient affidavit showing the particular facts and matters which constitute good cause for disqualification under (1). The party must file the motion and affidavit no later than ten days before an original date set for hearing. Should a continuance of any hearing be required by the act of a party in seeking disqualification, such act shall not justify the issuance of a right to sue letter where a hearing was scheduled to be held within 90 days of the date of service of a notice of hearing.

(3) Following the filing of a motion and affidavit of disqualification and a reasonable period of time for an opposing party to comment upon it, the hearing examiner shall either enter an order of recusal or decline disqualification. That order must specify the particular facts and grounds upon which it is based.

(4) When a hearing examiner declines disqualification, a party objecting to the hearing examiner's ruling and order must petition the commission for an order of disqualification within ten days following the date of the order declining disqualification. If no such petition is filed, the order is not appealable to the commission.

(5) A party may disqualify a member of the commission from participating in a matter before the commission upon the same grounds and with the same procedure as that for the disqualification of a hearing examiner. A party seeking to disqualify a member of the commission must file a motion and affidavit of disqualification with the commission not less than ten days prior to the date fixed for a hearing or proceeding before the commission. The question of disqualification shall be determined by a quorum of the commission, which may include the member of the commission to be disqualified if his or her participation is required to constitute a quorum or decide the matter.

(6) A hearing examiner or member of the commission may make an order or give a notice of recusal or self-disqualification at any time. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-611, 49-2-505, and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.308 EX PARTE CONSULTATIONS (1) No hearing examiner or member of the commission may participate in or initiate any ex parte consultation on the merits of a matter with any party or the department. A hearing examiner or member of the commission may engage in a communication concerning administrative or procedural matters where they are necessary under the circumstances and do not adversely affect the substantial rights of a party.

(2) The commission or a hearing examiner may consult with any person or the department regarding the interpretation of a point of law. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-613, 49-2-505, and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.309 CONTESTED CASE RECORD (1) The record in a contested case shall include:

- (a) All pleadings, motions, intermediate rulings;
- (b) All evidence received or considered, including a stenographic record of oral proceedings when demanded by a party;
- (c) A statement of matters officially noticed;
- (d) Questions and offers of proof, objections and rulings thereon;
- (e) Proposed findings and exceptions;
- (f) Any decision, opinion, or report by the hearing examiner or commission member presiding at the hearing;
- (g) All department memoranda or data submitted to the hearing examiner or members of the commission as evidence in connection with their consideration of the case.

(2) The hearing will be recorded electronically unless a party demands a stenographic record. If a party desires a stenographic record of any hearing or proceeding, it must be requested not less than 15 days prior to the hearing or proceeding. The party requesting a stenographic record must arrange and pay for it. Any electronic or stenographic record of oral proceedings or any part thereof shall be transcribed on request of any party. The cost of the transcription shall be paid by the requesting party. A party who has a transcript prepared shall file an original and six copies with the commission. The original transcript shall be included in the record of the contested case.

(3) If an electronic recording of any hearing or proceeding is defective or cannot be transcribed, the hearing examiner may reconstruct the record or the parties may reconstruct the record by stipulation. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-614, 49-2-505, and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1990 MAR p. 525, Eff. 3/16/90; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.310 PLACE OF HEARING (1) The commission or hearing examiner shall hold contested case hearings in the county where the unlawful conduct is alleged to have occurred, unless the respondent or the commission requests a change of venue for good cause shown. The hearing examiner may exercise the power of the commission to change venue for the hearing of a contested case upon the entry of a default against a respondent, to expedite hearing, or otherwise provide for a fair hearing upon good cause which appears of record.

(2) The hearing examiner may require a party to make arrangements for a suitable place of hearing and bear the cost of facilities to conduct the hearing. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-505, 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.311 FORMAL PROCEEDINGS (1) All proceedings shall be formal unless informal proceedings or disposition under 2-4-604, MCA are permitted by stipulation of the parties, agreed settlement, consent order or default. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-603, 2-4-604, 2-4-612, 49-2-505, 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.312 INFORMAL PROCEEDINGS (1) A proposed order may be made following informal proceedings, which may be conducted where the parties to a contested case jointly waive a formal proceeding, where the default of a party is entered, or where informal proceedings are appropriate following the imposition of sanctions upon a party.

(2) When informal proceedings are used the hearing examiner shall give parties an opportunity to present evidence at a convenient time and place, using fair procedures, to present to the hearing examiner:

(a) Written or oral evidence in opposition to the department determination of the sufficiency of evidence in support of a complaint, or other department action;

(b) A written statement challenging the grounds upon which the department or the commission has chosen to justify its action or inaction; or

(c) Other written or oral evidence relating to the contested case.

(3) During informal proceedings the hearing examiner may receive and consider evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs, but may not receive or consider evidence which is irrelevant, immaterial, or unduly repetitious. Hearsay evidence may be received and considered to supplement or explain other evidence, but such hearsay evidence may not be considered to support a finding unless it would otherwise be admissible over objection in civil actions or under the Montana Rules of Evidence.

(4) The hearing examiner may receive the department record or investigative file in evidence in informal proceedings, subject to objections or requests to strike hearsay evidence or other evidence not permitted under (3).

(5) Telephonic hearings may be conducted during the course of informal proceedings. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-604, 49-2-505, and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.313 INFORMAL DISPOSITION (1) In accordance with the provisions of ARM 24.9.311 a hearing examiner may make an informal disposition of any matter.

(2) Where a charging party seeks to withdraw a complaint and the only issue remaining to resolve a contested case is the nature, scope and extent of affirmative relief to protect public interests, the department may request informal disposition of a contested case to grant such relief in a proposed order.

(3) The hearing examiner may enter a proposed order upon agreed settlements, consent orders and defaults by means of informal disposition, including telephonic hearings. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-604, 49-2-505, and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.314 DOCUMENT FORMAT, FILING AND SERVICE (1) All documents, pleadings, and papers to be filed shall be eight and one-half inches by eleven inches (8½" x 11") in size. Papers must be double-spaced, clearly legible and submitted on calendared bond paper in accordance with the format for papers used in district court. Exhibits or other documents shall be reproduced in like size unless the original exhibit is required. A hearing examiner may require the reproduction of an oversized demonstrative or other exhibit in a size appropriate for the record.

(2) The place of filing is the offices of the Hearings Bureau, Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624-1728.

(3) Filing with the commission is effective upon actual receipt at the offices of the department and not upon mailing.

(4) Parties shall submit the original or original copy and one copy of all submissions for the record until entry of the proposed order, unless otherwise directed by the commission or its hearing examiner. After a proposed order has been entered, parties shall submit the original or original copy and six copies of all submissions unless otherwise directed by the commission.

(5) Copies of all submissions filed must be served upon all parties of record, including intervenors or other parties allowed to appear for special purposes, and all submissions must contain or be accompanied by a certificate of service showing proof of the method of service and the date upon which such service was made. Service of copies of submissions upon parties shall be made in accordance with the Montana Rules of Civil Procedure and may be made by means of first class mail, postage prepaid, unless the hearing examiner designates another manner of service.

(6) The hearing examiner may accept telephonic or oral filings of motions or requests for procedural relief, subject to recording by means of minute entry, note or the subsequent filing of a true and accurate recording of such matters, upon fair and timely notice to all parties of record.

(7) Filing of a fascimile copy of a document of no more than 20 pages, which is an exact duplicate of the original, shall meet the filing requirements of these rules only if the fascimile copy is followed within five days by filing of the original or original copy of the document and required copies. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-106, 49-2-505, and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1991 MAR p. 308, Eff. 3/15/91; AMD, 1993 MAR p. 298, Eff. 2/26/93; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.315 TIME (1) In computing any period of time for acts required by any of the commission's rules, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is included unless it is a Saturday, Sunday, legal holiday, or the department offices are closed on such day. In that event, the period runs until the end of the next day when the department offices are open which is not one of the aforementioned days. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays are excluded in computation. A half holiday will be considered as other days and not as a holiday.

(2) Whenever a party has a right or is required to do some act under any of the commission's rules within a prescribed period after service of a notice or other paper upon the party and service is by mail, three days shall be added to the prescribed period. The date of service is computed from the date on which service is made by mail, as shown by the certificate of service or date of mailing. Service by mail is complete upon mailing.

(3) Except as to dates fixed by statute and not subject to modification, the hearing examiner or the commission may enlarge the time to perform an act. The time may be enlarged for cause shown, with or without a motion or notice, when a request for enlargement of time is made prior to the expiration of the time in which the act is to be performed. If the request is made after the expiration of the specified period in which to act, enlargement may be allowed only upon a showing of excusable neglect in the failure to act. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-505 and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1991 MAR p. 308, Eff. 3/15/91; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.316 APPLICATION OF RULES AND UNREPRESENTED PARTIES (1)

Where errors of law or procedure do not cause prejudice to a party or deny a party a fair hearing or fundamental justice, they may be disregarded. Parties who assign error for the violation of any rule must demonstrate that a failure to comply with these rules is in fact prejudicial or constitutes prejudice as a matter of law.

(2) Where strict adherence to these rules would cause undue hardship or create a substantial injustice to a party, the commission or hearing examiner may modify, waive, or excuse their application. The commission or hearing examiner may not modify, waive, or excuse mandatory acts which are required by statute or due process of law.

(3) Parties who choose not to be represented by counsel and who represent themselves must substantially comply with the provisions of these rules, subject to the provisions of (2). A hearing examiner or the commission may modify the strict application of these rules to an unrepresented party to the extent they are not mandatory in order to assure a fair hearing. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-505, 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.317 APPEARANCE, DISMISSAL AND DEFAULT (1)

Answers to complaints following the certification of a contested case for hearing are not required. The contentions of the parties and fair notice of them to prepare for hearing shall be developed through discovery and prehearing orders.

(2) A party may obtain a definite and detailed statement of matters of complaint or defense through discovery, preparation of the prehearing memorandum, during a prehearing conference or by appropriate motion.

(3) Each party shall make its appearance in a contested case within 20 days of the date on which service of contested case certification is made upon the party or his or her legal representative. Appearance shall be in the form of a written notice acknowledging service of certification, and a designation of the name, address and telephone number of the attorney for a party. If a party chooses not to be represented by counsel, such fact shall be indicated in the written appearance. This rule is subject to the provisions of 2-4-106, MCA and Rule 4D of the Montana Rules of Civil Procedure governing service by mail.

(4) In the event a party fails to appear, fails to comply with an order, fails to prosecute or defend the case, fails to engage in discovery or otherwise fails to do an act required by law or these rules, the hearing examiner or commission may enter an appropriate order terminating the contested case or limiting prosecution or defense of the contested case. Such orders may include dismissal of a complaint, entry of default, disposition by informal procedure under ARM 24.9.311, 24.9.312, 24.9.313 or entry of other appropriate orders.

(5) A party may be relieved of any of the sanctions provided in (4) upon a showing of excusable neglect, good cause, and a good faith willingness to comply with the further orders of the hearing examiner or the commission. A party may request such relief by the filing of a motion and supporting affidavit within ten days of the entry of an order imposing such sanctions.

(6) Upon the entry of a default against a respondent, the hearing examiner may fix a date or procedures for informal disposition of the complaint. Upon the default the charging party must present evidence in support of the complaint and proof of damages.

(7) Upon entry of an order of dismissal of a complaint, where the department has made a reasonable cause determination, the commission or hearing examiner shall notify the department of the proposed dismissal of the case to permit the department to present the case in support of the complaint and obtain the entry of orders of appropriate affirmative relief. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-106, 2-4-603, 49-2-505, and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

#### 24.9.318 INTERVENTION

(1) Where it appears that a pending contested case will affect or determine the legal rights, duties, or privileges of a person or where the joinder of a party is needed for just adjudication under the provisions of Rule 19 of the Montana Rules of Civil Procedure, such person will be allowed to intervene as a party upon timely application or where such fact appears as of record.

(2) Where permissive intervention or joinder of a party would be permitted under the provisions of Rule 20 of the Montana Rules of Civil Procedure, such intervention or joinder may be allowed upon timely application and a lack of prejudice to the parties of record. Where intervention would delay the hearing or disposition of a contested case, duplicate contentions of a party, cause prejudice to a party, or where the interests of a party seeking intervention are adequately represented by a party of record, the commission or hearing examiner may deny intervention or joinder.



(3) The hearing examiner or the commission may permit a party who does not seek to intervene as of right to participate in a matter in a limited capacity, but not as a party. A person who may not seek intervention as of right may be permitted to participate in a contested case in a limited manner, such as a friend of the commission, where such participation would not cause prejudice to a party, delay proceedings or deny a fair hearing. In such instances, a limited participant shall not have the right to control proceedings. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-505, 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.319 CLASS ACTIONS (1) A complaint may be prosecuted as a class action where the outcome of a contested case will affect a class of persons and where a class action would otherwise be allowed under Rule 23 of the Montana Rules of Civil Procedure.

(2) Class action applications, motions and procedures following certification of a contested case for hearing shall be governed by Rule 23 of the Montana Rules of Civil Procedure and any Montana law governing class actions. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-505, 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.320 MOTIONS (1) Any party may seek procedural relief in a contested case by means of an appropriate motion. Appropriate motions include motions to dismiss, motions for summary judgment or judgment upon the pleadings, motions to strike and any other motion provided for or permitted by the Montana Rules of Civil Procedure.

(2) Motions shall clearly state the procedural relief sought by a party, the grounds and authority supporting the entry of an order granting the motion, any prejudice which would result should the motion be denied, and the precise relief desired. All motions which assert factual matters not of record as the grounds for relief must be accompanied by affidavits or verified exhibits which show the facts upon which the proposed relief is grounded. Each motion must be supported by a brief or memorandum of law showing the moving party's entitlement to relief as a matter of law. The commission or hearing examiner may deny any motion which is not supported by an affidavit, where required, and which is not supported by a brief or memorandum of law.

(3) Upon filing a motion or within five days thereafter, the moving party shall file the brief provided for in (2). Within ten days after service of that brief the opposing party shall file an answer brief. Within ten days after the service of the answer brief the moving party may file a reply brief or other appropriate response.

(4) The failure to file a brief or a memorandum of law may subject the motion to summary ruling, and failure of a moving party to file a brief in support of the motion may be treated as an admission the motion is without merit. The failure to file an answer brief may be treated as an admission the motion is well taken and should be granted. The filing of a reply brief by the movant is optional and failure to file one will not subject the motion to summary ruling.

(5) The hearing examiner or the commission may order live or telephonic oral argument upon a motion on its own motion or that of a party, or may limit argument upon motions to the moving and responding papers. Unless oral argument is required, a motion is deemed submitted for a ruling upon the expiration of the time allowed by (3) or by any enlargement of time allowed by order. Where oral argument is allowed, the motion is deemed submitted at the close of oral argument or upon further order. (6) Oral motions may be heard during the course of hearing or in extraordinary situations which do not result in prejudice to a party. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-505, 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.321 EVIDENCE (1) The evidence received and considered in contested case hearings shall conform to the Montana Rules of Evidence and the provisions of 2-4-612, MCA, except as modified for informal proceedings under 2-4-603 and 2-4-604, MCA.

(2) In evaluating evidence in the record the hearing examiner or the commission may use experience, technical competence and specialized knowledge as permitted by law.

(3) The hearing examiner or the commission may take notice of judicially or officially cognizable facts and of generally recognized technical or scientific facts within the department's or commission's specialized knowledge. Such facts or knowledge may be obtained from treatises of learned scholars and public documents to the extent allowed by the Rules of Evidence. The department or commission shall notify parties of materials noticed and give them an opportunity to contest or comment upon them.

(4) Parties have the right to conduct cross-examination for a full and true disclosure of facts, and other examination by way of examination beyond the scope of direct, cross or redirect examination shall be within the sound discretion of the hearing examiner or the commission. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-603, 2-4-604, 2-4-612, 49-2-505, and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.322 DISCOVERY (1) The methods, scope and procedures of discovery are those governed and permitted by Rules 26 through 37 of the Montana Rules of Civil Procedure, recognizing that the commission or a hearing examiner are not permitted by law to make an award of attorney fees as a sanction for failure to make discovery.

(2) The hearing examiner or the commission may fix the time, places and methods of discovery by conference, prehearing order or otherwise, and may enter appropriate orders for violations of orders fixing discovery procedures.

(3) Depositions, interrogatories and answers to them, requests for production of documents and responses to them, and other discovery documents shall not be filed with the commission. A party who makes a motion referring to or supported by the product of discovery must support the motion by copies or verified abstracts of the discovery relied upon. A party who seeks to introduce the product of discovery as a part of the record must identify such documents in a prehearing memorandum or during the course of a prehearing conference. The use of depositions at hearing or in lieu of testimony by a witness shall be governed by the Montana Rules of Civil Procedure. Where portions of a deposition are necessary for consideration, the hearing examiner or the commission may order the preparation of excerpts of a deposition to avoid a bulky record or consideration of irrelevant or prejudicial matter. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-602, 49-2-505, 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.323 AMENDMENT OF COMPLAINT (1) A charging party may amend a complaint to cure defects or omissions, including procedural defects or defects in verification, and to allege new facts and matters arising out of continuing violation of law. A charging party may also amend a complaint where an amendment is necessary to provide a respondent with fair notice of the allegations of a party.

(2) The allowance or denial of an amendment to a complaint shall be governed by the provisions of 49-2-501(2) and 49-3-304(2), MCA with respect to the time for filing complaints except when the new material relates back to the filing of the original complaint.

(3) Complaints filed by the department on behalf of the commission shall not, unless so specified, constitute the filing of a new complaint but shall relate to the underlying complaint in a contested case as an amendment to it. The department may file a complaint or seek to amend a complaint to allege a discriminatory practice at any time.

(4) The charging party may amend the complaint at any time prior to a prehearing conference. Thereafter the charging party may amend the complaint only by leave of the hearing examiner, the commission or consent of an adverse party.

(5) A complaint may be amended by way of a prehearing order which contains the contentions of the parties and which is substituted for pleadings in the contested case.

(6) To the extent the amendment of pleadings is not otherwise addressed in this rule, such amendments shall be governed by the provisions of rule 15 of the Montana Rules of Civil Procedure. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-501, 49-2-505, 49-3-304, and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.324 PREHEARING CONFERENCES AND ORDERS (1) The commission or hearing examiner will hear all contested cases based upon a prehearing order which contains the full contentions of the parties as to fact and law, along with their claims for relief. The prehearing order shall supersede all prior pleadings in the contested case. Where a hearing is conducted following the default of a respondent, by stipulation of the parties as to limited matters, agreed settlement or a consent order, the hearing examiner or the commission may waive the requirement of a prehearing order.

(2) The commission may direct a hearing officer, hearing examiner or member of the commission to conduct a prehearing conference and prepare or approve a prehearing order in any contested case or other matter which may be heard before the commission. The commission may also require a prehearing conference in situations involving numerous parties, complex issues of fact or law or a lengthy record for the purpose of simplifying issues or assisting the commission in making its determinations and orders.

(3) A hearing examiner or the commission may order preliminary prehearing conferences, prehearing conferences or other procedures to simplify evidence and issues for hearing or consideration and otherwise enter orders to regulate the conduct of contested case proceedings. Prehearing orders shall contain the contentions of fact and law of the parties, the issues to be considered and the relief sought by the parties. The order may contain matters such as witness and exhibit lists, procedural time limitations, motions, requests for admission and such other matters as may facilitate the hearing and disposition of contested cases.

(4) If a party fails to comply with an order to prepare a prehearing memorandum or portions of one, or fails to participate in any prehearing conference or proceeding, a hearing examiner or the commission may impose sanctions upon that party by way of dismissal of the complaint, default, limitation of evidence in support of or in defense to a complaint or otherwise. A party may be bound by a recital of contentions in a prehearing memorandum or provided for in a prehearing order and may be deemed to have waived any matter of prosecution or defense not contained in a prehearing order.

(5) The prehearing order is substituted for the pleadings in a contested case and the order shall constitute the standard of relevance at hearing. The allowance of testimony, exhibits, or other evidence at hearing which is beyond the scope of the prehearing order is within the sound discretion of the hearing examiner or the commission.

(6) The hearing examiner or the commission may require the parties to exchange exhibits or summaries of evidence prior to hearing and submit all exhibits for entry in the record prior to hearing. The contentions of the parties as to fact and law contained in a prehearing order may be treated as the proposed findings of fact, conclusions of law and proposed orders, subject to such further submissions in argument as may be permitted. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-505 and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.325 SUBPOENAS (1) The hearing examiner or a member of the commission may issue subpoenas on their own motion or that of a party for the attendance of witnesses or production of evidence, and may fix the procedure for service of subpoenas and payment of fees in the manner provided in civil actions.

(2) The hearing examiner or the commission may enter appropriate orders, as allowed by law, for the failure of a person subject to the provisions of a subpoena to comply with its terms. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-104, 2-4-602, 49-2-203, 49-2-505, 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.326 HEARING (1) A contested case hearing shall be conducted before a hearing examiner or, at its discretion, a quorum of the commission.

(2) The hearing shall be conducted in the manner of civil actions before the district court, sitting without a jury, and the hearing examiner or the commission may enter appropriate orders during the course of the hearing to assure the conduct of a fair hearing. The method and scope of presentation of evidence at hearing, as well as the conduct of the hearing, recesses and continuances, is within the sound discretion of the hearing examiner or the commission. This subsection may be modified to the extent permitted by ARM 24.9.311 through 24.9.313.

(3) The hearing examiner or the commission may enter appropriate orders to control the conduct of the parties or their attorneys, including conduct which is disruptive or constitutes contempt, and may recess, continue or limit the course of hearing. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-612, 49-2-505, 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.327 PROPOSED ORDERS (1) Following the close of hearing or other proceeding which allows the parties an opportunity for hearing, the hearing examiner shall prepare a proposed order consisting of findings of fact, conclusions of law and recommended relief. Copies of the proposed order shall be served upon all parties of record.

(2) A hearing examiner may render an opinion of law in lieu of detailed references to authority in the making of conclusions of law.

(3) The proposed order shall substantially comply with the provisions of 2-4-623, 49-2-506, 49-2-507, 49-3-309, and 49-3-310, MCA with respect to final orders. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-621, 49-2-505, 49-2-506, 49-2-507, 49-3-308, 49-3-309, 49-3-310, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.328 NOTIFICATION OF ENTRY OF PROPOSED ORDER

(1) Upon the entry of a proposed order the hearing examiner shall give the parties written notice of the entry of that order, including the date of entry of the order and a notification of the rights of the parties to file exceptions to it for review by the commission. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-621, 49-2-505, 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88.)

24.9.329 EXCEPTIONS TO PROPOSED ORDERS (1) Following entry of a proposed order in a contested case and prior to consideration of that order by the commission, parties adversely affected by the proposed order shall have the opportunity to file exceptions, present briefs and present oral argument as provided in this rule.

(a) Once a proposed order is entered in a contested case, all parties shall thereafter submit an original or original copy and six copies of all submissions for the record unless otherwise directed by the commission. The department may reject and return any submission which does not include the required number of copies.

(2) Pursuant to 2-4-621(3), MCA, the commission in its final order may reject or modify the conclusions of law and interpretations of administrative rules in the proposed order but may not reject or modify the findings of fact unless the commission first reviews the complete record. The commission may accept or reduce any recommended award or penalty but may not increase it without reviewing the complete record.

(a) Unless all parties stipulate otherwise, a party filing exceptions requiring commission review of the complete record, must file six copies of all contested case pre-hearing submissions, hearing exhibits, a transcript of the hearing, all post-hearing submissions and the proposed order.

(b) A party filing exceptions not requiring commission review of the complete record must file six copies of all portions of the contested case record, including the proposed order, required for the commission's review of the exceptions.

(3) If a party making exceptions does not intend to file a transcript of the hearing, the party must file and serve the exceptions, a supporting brief and the portions of the record required for commission review of the exceptions within 20 days of service of the proposed order. Any opposing party must file and serve an answer brief within ten days of service of the exceptions and supporting brief. The party making exceptions must file and serve any reply brief within ten days of service of the answer brief.

(4) If a party making exceptions intends for the commission to review a transcript of the hearing and:

(a) a transcript of the hearing has been prepared and filed with the commission prior to issuance of the proposed order, the party must file and serve the exceptions, a supporting brief and the record within 20 days of service of the proposed order. Any opposing party must file and serve an answer brief within ten days of service of the exceptions and supporting brief. The party making exceptions must file and serve any reply brief within ten days of service of the answer brief.



(b) a transcript of the hearing has not been prepared and filed prior to issuance of the proposed order,

(i) within 20 days of service of the proposed order, a party making exceptions must file a notice of intent to file exceptions stating that commission review of a transcript of the hearing is required.

(ii) After the notice of intent to file exceptions is filed, a party making exceptions must arrange for preparation of a transcript of the hearing at his or her own expense. The party making exceptions must file an original and six copies of the transcript with the commission within 40 days of filing the notice of intent to file exceptions.

(iii) If more than one party gives notice of intent to file exceptions, all parties making exceptions which require review of a transcript of the hearing must share equally in the cost of the transcript and copies.

(iv) A party making exceptions must file the exceptions, a supporting brief and the record within 20 days of the date of filing the transcript. Any opposing party must file and serve an answer brief within ten days of service of the exceptions and supporting brief. The party making exceptions must file and serve any reply brief within ten days of service of the answer brief.

(5) No enlargement of time will be allowed for compliance with any of the requirements of this rule except on a showing of good cause.

(6) Except upon stipulation of all parties, a transcript shall be prepared by an impartial person with no affiliation to any party and with no interest in the outcome of the case. A transcript shall be a verbatim and complete account of all proceedings on the record of the hearing and shall be in the form commonly accepted by the courts of record of this state. The preparer of a transcript shall certify that the transcript is a complete and accurate account of the stenographic or electronic recording of the hearing and that the preparer has no affiliation with any party and has no interest in the outcome of the case.

(7) Where no party files exceptions to a proposed order within the time permitted by this rule, commission review shall be upon the proposed order under the provisions of 2-4-621(3), MCA.

(8) If a party making exceptions fails to file a brief in support of exceptions within the time provided by this rule, or within any extension of time granted, any opposing party may move to strike the exceptions. If an opposing party fails to file a brief in opposition to exceptions within the time provided by this rule, or within any extension of time granted, that party will not be heard at oral argument except by permission of the commission.

(9) When a party has timely filed exceptions to a proposed order and has timely filed a supporting brief, the commission will fix a date to provide the parties an opportunity to present oral argument to the commission. Each party is allowed one-half hour of argument before the commission. Oral argument may be waived by the parties.

(10) The chair of the commission, his or her designee, or a hearing examiner appointed by the commission may consider procedural motions and enter procedural orders as necessary for commission review.

(11) The commission may appoint a member of the commission or hearing examiner for the purpose of conducting a prehearing conference prior to commission consideration of exceptions. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-621, 2-4-623, 49-2-505, and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1990 MAR p. 525, Eff. 3/16/90; AMD, 1993 MAR p. 560, Eff. 2/26/93; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

#### 24.9.330 COMMISSION HEARINGS TO CONSIDER EXCEPTIONS

(1) On the date fixed by the commission for oral argument upon the exceptions of the parties, a quorum of the commission shall hear oral argument.

(2) Any member of the commission who is absent at the presentation of oral argument may participate in deliberations and the entry of a final decision or order of the commission in a contested case if he or she, where required, reviews the complete record of the contested case, including a recording or transcript of the oral argument of the parties.

(3) At the time of oral argument, and subject to the rule of the commission chair, any member of the commission may pose questions to a party, his or her representatives. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-621, 2-4-623, 49-2-505, and 49-3-308, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.331 FINAL ORDERS (1) Where no exceptions to a proposed order have been made by the parties and commission consideration is upon the order itself, the commission may reject or modify conclusions of law contained in the order. The commission may not reject or modify the findings of fact contained in the proposed order unless a party makes exceptions in accordance with ARM 24.9.329 or the commission orders a review upon the complete record of the contested case.

(2) The commission may adopt the proposed order as its final order, and must rule upon exceptions made by the parties. It may also enter its separate final order, with findings of fact, conclusions of law and orders in accordance with 2-4-623, MCA.

(3) All orders of monetary relief must state the basis and method of computation for amounts awarded. If a party fails to propose findings of fact in support of his or her claim for specific monetary relief, the commission may require the parties to submit the necessary computation required for relief or may decline the relief.

(4) Regardless of the claims of the parties, the commission may grant all relief permitted by 49-2-506 and 49-3-309, MCA, including full affirmative relief in the public interest, subject to the provisions of 2-4-621, MCA with respect to an increase of award over that recommended in the proposed order. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-623, 49-2-505, 49-2-506, 49-2-507, 49-3-308, 49-3-309, 49-3-310, MCA; NEW, 1988 MAR p. 1194, Eff. 6/10/88.)

## Sub-Chapter 4

## Declaratory Rulings

24.9.401 PURPOSE AND SCOPE OF RULES (1) ARM 24.9.401 through 24.9.414 are the rules of practice and procedure for declaratory rulings before the human rights commission.

(2) A declaratory ruling from the human rights commission may be sought in two contexts. First, any aggrieved or interested person may petition the human rights commission for a declaratory ruling as to the applicability of any statute within the jurisdiction of the commission or any rule or order of the commission. Second, any person, educational institution, financial institution, governmental entity, state or local agency which seeks an exemption from the requirements of chapter 2, or chapter 3 of Title 49, MCA, may petition the human rights commission for a declaratory ruling to grant such an exemption.

(3) A petition for a declaratory ruling is the sole method of obtaining a binding determination of legal rights, duties, or privileges from the commission other than by a determination of such matters by means of a contested case hearing. While opinions of the department carry persuasive weight, only judicial determinations, contested case and declaratory ruling decisions, and the rules of the commission are binding upon the commission. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-501, 49-2-204, and 49-3-106, MCA; NEW, 1988 MAR p. 2308, Eff. 10/28/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.402 CONSTRUCTION OF STATUTES AND RULES (1) Statutes and rules of the commission which have the intent and purpose of protecting rights, duties and privileges secured by law are liberally construed. "Liberal construction" means, without limitation, giving broad coverage and inclusive interpretation to human rights statutes and rules to assure enforcement and protection of the rights secured by them.

(2) Statutes and rules of the commission will be strictly construed with respect to exemptions from them, bona fide occupational qualifications or other exceptions from the protection of law. "Strict construction" means, without qualification, allowing exemptions or exceptions only in extraordinary circumstances where they are specifically authorized by law and have a factual basis.

(3) In those situations where the interpretation of a statute, rule or other law is unclear from Montana precedent, the commission may use other pertinent and persuasive precedent to aid statutory interpretation. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-501, 49-2-401, 49-2-402, 49-2-403, 49-3-105, MCA; NEW, 1988 MAR p. 2308, Eff. 10/28/88.)

24.9.403 FORM AND CONTENT OF PETITION (1) Petitions for declaratory ruling shall contain each of the following:

- (a) The name and address of the petitioner.
  - (b) A statement of the interest or aggrievement of the petitioner in seeking a declaratory ruling and the reason for the filing of the petition.
  - (c) A detailed statement of facts showing the justification for a declaratory ruling.
  - (d) The statute, rule or legal authority which supports the issuance of a declaratory ruling.
  - (e) The contentions of law or authority in support of the petition.
  - (f) The precise questions of fact or law presented for decision.
  - (g) The specific relief requested should the petition be granted.
  - (h) A statement of the names, addresses and interests of all persons known to be interested in the declaratory ruling which is being sought and those whose interests may be materially affected by the declaratory ruling which is sought.
  - (i) A statement of the reasonable efforts made by the petitioner to identify interested or affected persons.
- (2) If the petitioner fails to adequately identify its interest, or need for a declaratory ruling, or if a petitioner fails to adequately identify interested or affected persons or attempts to identify them, the petition may be summarily dismissed. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-501, 49-2-401, 49-3-105, MCA; NEW, 1988 MAR p. 2308, Eff. 10/28/88.)

24.9.404 FILING AND DOCKETING FOR HEARING (1) Petitions for declaratory rulings must be filed at the offices of the Human Rights Bureau, Department of Labor and Industry, P.O. Box 1728, Helena, MT 59624-1728.

(2) Petitions for declaratory rulings may be heard by the full commission, by a single member of the commission, or by a hearing examiner appointed by the commission.

(3) Upon the filing of a petition for a declaratory ruling the department shall review the sufficiency of the petition for compliance with ARM 24.9.403, the standing of the petitioner, the existence of a genuine case or controversy, the availability of other adequate remedies at law, subject matter jurisdiction, multiplicity of proceedings, lack of a substantial legal question or other defects apparent on the face of the petition.

(4) If it appears the petition is adequate as a matter of law and there are reasonable grounds for it to be heard, the department shall assign the petition to a hearing examiner for hearing or set the matter for hearing before the commission. If the petition is defective as a matter of law or there are no reasonable grounds for it to be heard, the department shall present the petition to the commission for its consideration. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-501, 49-2-204, and 49-3-106, MCA; NEW, 1988 MAR p. 2308, Eff. 10/28/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.405 APPOINTMENT OF HEARING EXAMINER AND AUTHORITY

(1) A hearing examiner or member of the commission assigned to preside over petitions for declaratory rulings and hearings upon them shall have those powers and that authority contained in ARM 24.9.306.

(2) The hearing examiner shall expedite the hearing of petitions for declaratory rulings to the extent possible consistent with preserving the right to a fair hearing.

(3) The hearing examiner shall, to the extent possible and in compliance with the rights of the public to be heard and participate in public hearings, encourage and permit public participation in declaratory ruling hearings as well as public commentary upon the issues before the commission. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-501, 49-2-204, and 49-3-106, MCA; NEW, 1988 MAR p. 2308, Eff. 10/38/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.406 NOTICE

(1) The department shall notify interested parties and the public of the petition for a declaratory ruling, the date of the prehearing conference regarding the petition, and the hearing of the petition. The department may require the petitioner to prepare the notice and serve it as required by this rule.

(2) The notice of hearing shall contain:

(a) The time and place of the prehearing conference regarding the petition.

(b) The date, time and place of hearing.

(c) The identity of the petitioner.

(d) The issues posed for consideration.

(e) The method for obtaining a copy of the petition and procedure for intervention or participation in declaratory ruling proceedings.

(3) The petitioner shall notify the interested or affected parties identified in the petition and any other interested or affected parties identified by the department of the petition. The petitioner shall give notice by serving a copy of the notice of hearing and the petition, by first class mail.

(4) The department shall notify the public of the petition through news releases issued by the department, which describe the petition, advise of the prehearing and hearing dates and explain how interested parties may intervene or participate in proceedings. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-501, 49-2-204, and 49-3-106, MCA; NEW, 1988 MAR p. 2308, Eff. 10/28/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

#### 24.9.407 PARTIES

(1) Any person who demonstrates an interest in the outcome of a petition for a declaratory ruling by showing his or her rights, duties or privileges will be affected by the ruling or who shows that he or she may be aggrieved by the outcome of a ruling may intervene in declaratory ruling proceedings.

(2) Any person, even though he or she does not have a direct interest in the outcome of a petition for a declaratory ruling, may participate in proceedings in a limited manner, as allowed by the commission or a hearing examiner. Parties permitted to appear or participate in proceedings for limited purposes may comment upon the petition and file briefs in support of their position, but may not examine witnesses, control proceedings or seek review of proposed orders or rulings of the commission or hearing examiner.

(3) The department may intervene and participate in proceedings for a declaratory ruling as a party, or for limited purposes, to represent the interests of the commission or the public.

(4) The department may identify any party who may have an interest in the outcome of declaratory ruling proceedings and notify the party of the petition for a declaratory ruling. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-501, 49-2-204, and 49-3-106, MCA; NEW, 1988 MAR p. 2308, Eff. 10/28/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

#### 24.9.408 PLACE OF HEARING

(1) Except as provided in (2), hearings of petitions for declaratory rulings will be conducted at Helena, Lewis and Clark County, Montana.

(2) The hearing examiner or commission may conduct the hearing of a petition for declaratory ruling in a place other than Helena, Montana, upon the request of the petitioner or a party for good cause.

The hearing examiner or the commission may, on motion of a party or its own motion, conduct declaratory ruling proceedings at any place within the state of Montana to assure the conduct of a fair hearing. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-501, 49-2-401, 49-3-105, MCA; NEW, 1988 MAR p. 2308, Eff. 10/28/88.)

24.9.409 PREHEARING CONFERENCES (1) Upon appointment to preside over a petition for a declaratory ruling, a member of the commission or the hearing examiner will fix the dates for a prehearing conference and hearing.

(2) The hearing examiner will conduct a prehearing conference using the procedures set forth in ARM 24.9.324. In addition, during the prehearing conference, the hearing examiner will determine the interests of persons seeking intervention or other participation in the hearing on the petition in accordance with ARM 24.9.407. The hearing examiner may exclude from the proceedings persons who do not seek intervention or request to participate in the hearing on or before the date of the prehearing conference. Persons excluded from the proceedings are not permitted to participate in any manner.

(3) The prehearing order which is prepared following a prehearing conference may address matters of evidence, including the introduction of scientific studies, the presentation of expert testimony, and facts which will be officially noticed. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-501, 49-2-204, and 49-3-106, MCA; NEW, 1988 MAR p. 2308, Eff. 10/28/88; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.410 NATURE OF HEARINGS (1) Hearings on petitions for declaratory rulings shall be formal unless the parties stipulate that proceedings may be informal under 2-4-604, MCA. (2) The parties may, by stipulation that proceedings may be informal, or by other stipulation, provide for hearing upon written evidence, stipulated fact, scientific evidence and literature, or otherwise. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-501, 2-4-603, 2-4-604, 49-2-401, 49-3-105, MCA; NEW, 1988 MAR p. 2308, Eff. 10/28/88.)

24.9.411 PROPOSED ORDERS (1) Following the introduction of evidence on the petition and the close of hearing the commission or the hearing examiner shall make a proposed order upon the petition in the form of findings of fact, conclusions of law and proposed orders. The findings of fact and conclusions of law may be supported with an opinion of law. ARM 24.9.327 and 24.9.328 will apply to proposed orders made under this rule.

(2) Any party aggrieved by a proposed order may file exceptions to it in accordance with ARM 24.9.327 and 24.9.328. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-501, 2-4-621, 2-4-623, 49-2-401, 49-3-104, MCA; NEW, 1988 MAR p. 2308, Eff. 10/28/88.)



24.9.412 FINAL ORDERS (1) The commission may enter its final order upon a petition based on the proposed order or the exceptions of the parties, or in the form of findings of fact, conclusions of law and final orders, in accordance with ARM 24.9.331.

(2) All commission final orders upon a petition for declaratory ruling will be published in the Montana Administrative Register. The petitioner shall bear any cost of publication. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-501, 2-4-623, 49-2-401, 49-3-105, MCA; NEW, 1988 MAR p. 2308, Eff. 10/28/88.)

24.9.413 EFFECT OF DECLARATORY RULING (1) Commission rulings and orders on petitions for a declaratory ruling are binding only upon the commission and the parties to the petition.

(2) The commission may limit the scope and application of the ruling of order to the facts or the situation presented by the petition and the evidence. The commission may also limit the precedential weight it will give to any such ruling or order. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-501, 49-2-401, 49-3-105, MCA; NEW, 1988 MAR p. 2308, Eff. 10/28/88.)

24.9.414 INCORPORATION OF OTHER RULES BY REFERENCE

(1) To the extent these rules may not provide for procedures for petitions for declaratory rulings, the commission or the hearing examiner may apply ARM 24.9.301 through 24.9.331, applicable to contested case hearings. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-501, 49-2-401, 49-3-105, MCA; NEW, 1988 MAR p. 2308, Eff. 10/28/88.)

Sub-Chapter 5 reserved

## Sub-Chapter 6

## Proof Of Unlawful Discrimination

24.9.601 PURPOSE OF THESE RULES REGARDING PROOF OF UNLAWFUL DISCRIMINATION (1) These rules regarding proof of unlawful discrimination are intended to provide general statements of what must be proved to establish unlawful discrimination in various kinds of complaints. They are not intended to be exhaustive statements of the applicable law, but general guidelines and informational summaries of the law. Practitioners appearing in cases before the department or commission should also refer to the statutes, the balance of the commission's rules, the department's rules, and the federal, state, commission and department decisions addressing the issues in their particular cases. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-301 through 49-2-404, 49-3-103, 49-3-104, and 49-3-201 through 49-3-209, MCA; NEW, 1996 MAR p. 2871, Eff. 10/25/96; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.602 MEMBERSHIP IN A PROTECTED CLASS (1) "Membership in a protected class" means belonging to a group of persons who are afforded protection against discrimination because of race, creed, color, sex (including pregnancy), physical or mental disability, age, marital status, familial status, national origin or political beliefs or ideas as set forth in the act or code.

(2) The person alleging discrimination has the burden of proving that the charging party or other aggrieved person is a member of a protected class. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-101, 49-2-303, 49-2-304, 49-2-305, 49-2-306, 49-2-307, 49-2-308, 49-2-403, 49-3-101, 49-3-103, 49-3-104, 49-3-201, 49-3-202, 49-3-203, 49-3-204, 49-3-205, 49-3-206, 49-3-207, and 49-3-208, MCA; NEW, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.603 RETALIATION AND COERCION PROHIBITED (1) It is unlawful to retaliate against or otherwise discriminate against a person because the person engages in protected activity. A significant adverse act against a person because the person has engaged in protected activity or is associated with or related to a person who has engaged in protected activity is illegal retaliation. "Protected activity" means the exercise of rights under the act or code and may include:

(a) aiding or encouraging others in the exercise of rights under the act or code;

(b) opposing any act or practice made unlawful by the act or code; and

(c) filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision of the act or code.

(2) Significant adverse acts may include the following:

(a) violence or threats of violence, malicious damage to property, coercion, intimidation, harassment, the filing of a factually or legally baseless civil action or criminal complaint, or other interference with the person or property of an individual;

(b) discharge, demotion, denial of promotion, denial of benefits or other material adverse employment action;

(c) expulsion, blacklisting, denial of privileges or access, or other action adversely affecting the availability of goods, services, facilities, or advantages of a public accommodation;

(d) eviction, denial of services or privileges, or other action adversely affecting the availability of housing opportunities; and

(e) denial of credit, financing, insurance, educational, governmental or other services, benefits or opportunities.

(3) When a respondent or agent of a respondent has actual or constructive knowledge that proceedings are or have been pending with the department, with the commission or in court to enforce a provision of the act or code, significant adverse action taken by respondent or the agent of respondent against a charging party or complainant while the proceedings were pending or within six months following the final resolution of the proceedings will create a disputable presumption that the adverse action was in retaliation for protected activity. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-301 and 49-3-209, MCA; NEW, 1996 MAR p. 2871, Eff. 10/25/96; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.604 DISCRIMINATION PROHIBITED--EMPLOYMENT

(1) Except as provided in 49-2-303, 49-2-308 and 49-3-201, MCA, it is unlawful for an employer, agent of an employer, employment agency or labor organization to discriminate against a person in the terms, conditions or privileges of employment because of a person's membership in a protected class.

(2) Terms, conditions or privileges of employment which are subject to the act and code include:

- (a) recruitment, advertising and job application procedures;
- (b) hiring, promotion, upgrading, award of tenure, transfer, layoff, discipline, discharge, termination of employment, right to return from layoff, and rehiring;
- (c) rates of pay or compensation and changes in compensation;
- (d) job assignments, job classifications, organizational structures, position descriptions, lines of progression and seniority lists;
- (e) leaves of absence, sick leave or any other leave;
- (f) fringe benefits available through employment, whether or not administered by the employer;
- (g) selection and financial support for training, including apprenticeships, professional meetings, conferences or other related activities;
- (h) social and recreational activities sponsored by an employer, agent of an employer, employment agency or labor organization; and
- (i) any other term, condition or privilege of employment.

(3) Examples of practices which may constitute unlawful employment discrimination include the following:

- (a) denying, qualifying, or limiting a term, condition, or privilege of employment because of a person's membership in a protected class or protected activity;
- (b) subjecting a person to harassment in the workplace because of the person's membership in a protected class or protected activity;
- (c) failing to make reasonable accommodation as further explained in ARM 24.9.606 and 24.9.608;
- (d) segregating or classifying a person in a way that adversely affects employment status or opportunities because of membership in a protected class;
- (e) participating in a contract or other arrangement (including an arrangement with an organization providing fringe benefits or an organization providing training or apprenticeship programs) that has the effect of discriminating against persons in the terms, conditions or privileges of employment because of membership in a protected class;

(f) using standards, criteria or methods of administering or managing employment opportunities which discriminate in the terms, conditions or privileges of employment because of membership in a protected class or which perpetuate the denial of equal employment opportunities because of membership in a protected class;

(g) using or administering qualification standards, employment tests or other selection criteria that screen out or tend to screen out members of a protected class; and

(h) discriminating against a person in the terms, conditions or privileges of employment because the person has a relationship with or otherwise associates with a member of a protected class. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-202, 49-2-303, 49-2-308, and 49-3-201, MCA; NEW, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.605 EMPLOYMENT DISCRIMINATION: REASONABLE DEMANDS/BONA FIDE OCCUPATIONAL QUALIFICATION EXCEPTIONS (1) It is not unlawful employment discrimination to make a distinction based on age, physical or mental disability, marital status, or sex when the reasonable demands of the position or program require the distinction.

(2) The commission construes the exceptions contained in this rule strictly, against allowing the exception.

(3) The commission construes the statutory exception permitting distinctions based on age, marital status and sex in accordance with the legal standards for "bona fide occupational qualifications" under section 703(e)(1) of the Civil Rights Act of 1964 (42 U.S.C. 2000-2(e)(1)) and section 4(f) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(f)).

(4) The commission construes the statutory exception permitting distinctions based on physical or mental disability in accordance with the legal standards for determining whether a person is a "qualified individual with a disability" under section 101(8) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(8)).

(5) These exceptions are affirmative defenses. A respondent claiming an exception has the burden of proof on the issue. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-101(1), 49-2-101(15), 49-2-303, 49-3-101(1), 49-3-101(3), 49-3-101(5), 49-3-201, and 49-3-202, MCA; NEW, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.606 FAILURE TO MAKE REASONABLE ACCOMMODATION-- EMPLOYMENT DISCRIMINATION BECAUSE OF A DISABILITY (1) It is an unlawful discriminatory practice for an employer, agent of an employer, employment agency or labor organization to:

(a) fail to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee, employment applicant or union member with a physical or mental disability unless it can demonstrate that the accommodation would impose an undue hardship on the operation of the business in question; or

(b) deny equal employment opportunities to a person with a physical or mental disability because of the need to make a reasonable accommodation to the person's disability so that the person can perform the essential functions of an employment position.

(2) A person with a physical or mental disability is qualified to hold an employment position if the person can perform the essential functions of the job with or without a reasonable accommodation for the person's physical or mental disability. If an employer has prepared a written description before advertising or interviewing applicants, the description is evidence of the essential functions of the job.

(3) "Reasonable accommodation" to a person with a physical or mental disability for the purposes of enabling the person to perform the essential functions of an employment position may include:

(a) making existing facilities used by employees readily accessible to and usable by individuals with physical or mental disabilities; and

(b) job restructuring, part-time or modified work schedules, reassignment to vacant positions which the employee is qualified to hold, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations or training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with physical or mental disabilities.

(4) An accommodation to a person with a physical or mental disability for the purpose of enabling the person to perform the essential functions of an employment position is reasonable unless it would impose an undue hardship upon the employer.

(5) For purposes of determining whether an accommodation to a physical or mental disability is reasonable, "undue hardship" means an action requiring significant difficulty or extraordinary cost when considered in light of:

- (a) the nature and expense of the accommodation needed;
  - (b) the overall financial resources of the facility or facilities involved in the provision of the accommodation, the number of persons employed at the facility, the effect on expenses and resources of the facility, and other impacts of the accommodation on the operation of the facility;
  - (c) the overall financial resources of the business, the overall size of the business of the employer with respect to the number of employees, and the number and type and location of the facilities of the employer; and
  - (d) the type of operation or operations of the employer, including composition, structure, and functions of the work force of the employer, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the employer.
- (6) An accommodation to a person with a physical or mental disability for the purpose of enabling the person to perform the essential functions of an employment position is not reasonable if it would endanger the health or safety of any person.
- (7) If an employer defends an adverse employment action against a person with a physical or mental disability on the grounds that an accommodation would endanger the health or safety of a person, the employer's failure to independently assess whether the accommodation would create a reasonable probability of substantial harm will create a disputable presumption that the employer's justification is a pretext for discrimination on the basis of disability.
- (8) Independent assessment of the risk of substantial harm is evaluation by the employer of the probability and severity of potential injury in the circumstances, taking into account all relevant information regarding the work and medical history of the person with the disability before taking the adverse employment action in question. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-101(15), 49-3-101(3), 49-3-202, and 49-3-210, MCA; NEW, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.607 PROHIBITED MEDICAL EXAMINATIONS AND INQUIRIES--EMPLOYMENT DISCRIMINATION BASED ON DISABILITY (1) An employer, agent of an employer, employment agency or labor organization shall not require medical examinations or make inquiries of employees for the purposes of determining whether an employee has a physical or mental disability or to determine the nature or severity of a disability unless the examination or inquiry is shown to be job-related and consistent with business necessity.

(2) Use of an employment application form or process which requires a medical examination or makes an inquiry of a job applicant for the purpose of determining whether a person has a physical or mental disability or to determine the nature or severity of a physical or mental disability prior to an offer of employment constitutes a violation of 49-2-303(1)(c), MCA and is evidence of a violation of 49-2-303(1)(a), MCA unless the form or process complies with the requirements of this rule.

(3) An employer, agent of an employer, employment agency or labor organization may make pre-employment inquiries into the ability of an applicant to perform job-related functions.

(4) An employer, agent of an employer, employment agency or labor organization may require a medical examination of a person after an offer of employment has been made and prior to the commencement of the employment duties and may condition the offer of employment on the results of the examination if:

(a) all entering employees or union members in the same job category are subjected to the same examination regardless of disability;

(b) information obtained regarding the medical condition or history of a person is treated as a confidential medical record; and

(c) information obtained is collected and maintained in accordance with the requirements of the Americans with Disabilities Act (ADA) where the employer, employment agency or labor organization is subject to ADA requirements.

(5) An employer, agent of an employer, or labor organization may conduct voluntary medical examinations, including voluntary medical histories, that are part of a bona fide employee or union health program. Information obtained pursuant to a bona fide employee or union health program is a confidential medical record and subject to the same confidentiality requirements and restrictions on disclosure stated in (4).



(6) An employer, after a conditional offer of employment to a prospective employee, may inquire whether the prospective employee is certified or eligible to be certified as vocationally disabled for the purposes of the subsequent injury fund, pursuant to Title 39, chapter 71, part 9 of the Montana Workers' Compensation Act. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-303, 49-3-201, and 49-3-202, MCA; NEW, 1996 MAR p. 2871, Eff. 10/25/96; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.608 FAILURE TO ACCOMMODATE--EMPLOYMENT DISCRIMINATION BASED ON RELIGION (1) It is an unlawful discriminatory practice for an employer, an agent of an employer, an employment agency or a labor organization to discriminate against a person in the terms, conditions or privileges of employment because of religion.

(2) The term religion includes all aspects of religious observance, practice and belief.

(3) For purposes of providing equal employment opportunities, an employer has a duty to accommodate an employee's religion unless to do so would cause a more than de minimis hardship on the conduct of the business.

(a) An employee whose religion conflicts with an employment requirement has a duty to inform the employer of the conflict in a timely manner.

(b) Once informed of a religion based conflict, an employer has a duty to initiate good faith efforts to accommodate the conflict. An employer can demonstrate that an accommodation to an employee's religious belief or practice would cause a more than de minimis hardship with proof that the accommodation would require a significant cost to the business, would violate contract obligations which cannot be reconciled, or would otherwise cause a more than de minimis hardship to the employer.

(c) The employer and the employee have a mutual obligation to engage in bilateral cooperation in a search for a reasonable resolution of conflicts which may arise between an employer's business and an employee's religion.

(4) Determining whether an accommodation can be made and whether a more than de minimis hardship would occur for purposes of the provisions of the act or code prohibiting religious discrimination in employment must be made on a case by case basis. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-303, 49-3-201, and 49-3-202, MCA; NEW, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.609 DISCRIMINATION PROHIBITED--PUBLIC ACCOMMODATION (1)

Except as provided in 49-2-304, MCA, it is unlawful for an owner, lessee, manager, agent or employee of a public accommodation to deny equal access to services, goods, facilities, advantages or privileges to a person because of membership in a protected class.

(2) Unlawful discrimination in a public accommodation may include the following:

(a) imposing or applying qualification standards, admittance tests or other selection criteria that screen out or tend to screen out a person or persons who are members of a protected class unless the standard, test or other selection criteria can be shown to be necessary for the provision of the goods, services, facilities, advantages or privileges being offered;

(b) denying equal access to the goods, services, facilities, advantages or privileges of a public accommodation to a person because of the person's relationship or association with a member of a protected class; or

(c) subjecting a member of the public or patron to harassment in the public accommodation because of the person's membership in a protected class or protected activity.

(3) Unlawful discrimination against a person with a disability in a public accommodation may include:

(a) failing to make reasonable modifications in policies, practices or procedures when the modifications are necessary to afford the goods, services, facilities, advantages or privileges to persons with disabilities unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of its goods, services, facilities, advantages or privileges;

(b) failing to take necessary action to ensure that a person with a disability is not excluded, denied services, segregated or otherwise denied equal access because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, advantages or privileges being offered or would result in an unreasonable expense or undue burden after considering the circumstances of the public accommodation;

(c) failing to remove architectural barriers and communication barriers in existing facilities that are structural in nature and deny equal access to persons with disabilities when the removal is readily achievable; or

(d) failing to make goods, services, facilities, advantages and privileges available through alternative methods if removal of barriers that deny equal access to persons with disabilities is not readily achievable. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-101(15), 49-2-304, 49-3-101(3), and 49-3-208, MCA; NEW, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.610 BURDEN OF PROOF--DISPARATE TREATMENT (1) To prove a claim of unlawful discrimination or illegal retaliation based on disparate treatment, a charging party must establish a prima facie case in support of the alleged violation of the act or code.

(2) A prima facie case of discrimination or retaliation based on disparate treatment means evidence from which the trier of fact can infer that adverse action against the charging party was motivated by respondent's consideration of charging party's membership in a protected class, protected activity, or association with or relation to a person who is a member of a protected class or who has engaged in protected activity.

(a) The elements of a prima facie case will vary according to the type of charge and the alleged violation, but generally consist of proof:

(i) That charging party is a member of a protected class or engaged in protected activity;

(ii) That charging party sought and was qualified for an employment, housing, service, credit or other opportunity made available by the respondent; and

(iii) That charging party was denied the opportunity, or otherwise subjected to adverse action by respondent in circumstances raising a reasonable inference that charging party was treated differently because of membership in a protected class or because of protected activity.

(b) Examples of evidence establishing a reasonable inference that charging party was treated differently because of membership in a protected class or because of protected activity include:

(i) proof that respondent continued to make the employment, housing, service, credit, or other opportunity available to persons who are not members of the same protected class as charging party;

(ii) proof that similarly situated persons outside the protected class were treated more favorably;

(iii) proof that there was a close proximity in time between protected activity of the charging party and adverse action by the respondent;

(iv) proof that respondent intended to discriminate against persons of the protected class; or

(v) other proof that there is a causal connection between adverse action by the respondent and the charging party's membership in a protected class or protected activity.

(3) Once a charging party establishes a prima facie case of unlawful discrimination or illegal retaliation based on circumstantial evidence of disparate treatment, the respondent must produce evidence of a legitimate, nondiscriminatory reason for the challenged action.

(4) If a respondent produces evidence of a legitimate, nondiscriminatory reason for a challenged action in response to a prima facie case, the charging party must demonstrate that the reason offered by the respondent is a pretext for unlawful discrimination or illegal retaliation. The charging party can prove pretext with evidence that the respondent's acts were more likely based on an unlawful motive or indirectly with evidence that the explanation for the challenged action is not credible and is unworthy of belief.

(5) If a charging party has established a prima facie case with direct evidence of unlawful discrimination or illegal retaliation, the respondent must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-101, 49-2-303, 49-2-304, 49-2-305, 49-2-306, 49-2-307, 49-2-308, 49-2-403, 49-3-101, 49-3-103, 49-3-104, 49-3-201, 49-3-202, 49-3-203, 49-3-204, 49-3-205, 49-3-206, 49-3-207, and 49-3-208, MCA; NEW, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.611 BURDEN OF PROOF--MIXED MOTIVE CASE (1) When the charging party proves that the respondent engaged in unlawful discrimination or illegal retaliation but the respondent proves the same action would have been taken in the absence of the unlawful discrimination or illegal retaliation, the case is a mixed motive case. In a mixed motive case, the commission will order respondent to refrain from the discriminatory conduct and may impose other conditions to minimize future violations, but the commission will not issue an order awarding compensation for harm to the charging party caused by an adverse action that would have been taken by the respondent regardless of an unlawful discriminatory or retaliatory motive. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-101, 49-2-303, 49-2-304, 49-2-305, 49-2-306, 49-2-307, 49-2-308, 49-2-403, 49-3-101, 49-3-103, 49-3-104, 49-3-201, 49-3-202, 49-3-203, 49-3-204, 49-3-205, 49-3-206, 49-3-207, 49-3-208, and 49-3-209, MCA; NEW, 1996 MAR p. 28971, Eff. 10/25/96.)

24.9.612 BURDEN OF PROOF--DISPARATE IMPACT (1) To prevail on a claim of unlawful discrimination based on disparate impact, a charging party must establish a prima facie case by proving that one or more identified practices or policies of the respondent have a significant or substantial adverse effect on the charging party's protected class.

(2) Evidence of a respondent's intent to discriminate against members of a protected class is not required to establish a prima facie case of unlawful discriminatory practice based on disparate impact.

(3) Once a charging party establishes a prima facie case of unlawful discrimination based on a charge of disparate impact, the respondent must produce evidence of a legitimate business justification for the challenged practices or policies. Proof of a legitimate business justification requires admissible evidence that the challenged practices or policies are job-related and consistent with business necessity.

(4) If a respondent produces admissible evidence of a legitimate business justification for a challenged business practice or policy, the charging party must prove that the articulated justification offered by the respondent is a pretext for unlawful discrimination. The charging party may prove pretext directly with evidence that an unlawful motive more likely motivated the respondent, or indirectly with evidence that the articulated business justification is not worthy of belief or that there are other practices or policies available which are equally effective in serving the legitimate business interests of the respondent which do not have similar discriminatory effects upon members of a protected class. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-101, 49-2-303, 49-2-304, 49-2-305, 49-2-306, 49-2-307, 49-2-308, 49-2-403, 49-3-101, 49-3-103, 49-3-104, 49-3-201, 49-3-202, 49-3-203, 49-3-204, 49-3-205, 49-3-206, 49-3-207, and 49-3-208, MCA; NEW, 1996 MAR p. 2871, Eff. 10/25/96.)

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## Sub-Chapter 8

## General Provisions

24.9.801 DEFINITIONS (REPEALED) (History: Sec. 49-2-204 MCA; IMP, 49-2-101 MCA; NEW, Eff. 1/2/77; AMD, 1982 MAR p. 1691, Eff. 7/16/82; REP, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.802 COMMISSION MEETINGS: QUORUM; DECISION MAKING AUTHORITY (REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-201, 49-2-502, 49-2-505 MCA; NEW, Eff. 1/2/77; AMD, 1981 MAR p. 807, Eff. 8/14/81; AMD, 1981 MAR p. 1621, Eff. 11/26/81; REP, 1995 MAR p. 2264, Eff. 10/27/95.)

24.9.803 RETALIATION (REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-102, 49-2-303, 49-2-401 MCA; NEW, Eff. 1/2/77; REP, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.804 AFFIRMATIVE ACTION REQUIRED BY THE COMMISSION (REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-102, 49-2-203 MCA; NEW, Eff. 1/2/77; REP, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.805 EMPLOYMENT RECORDS (1) All employers, labor organizations, employment agencies, and government agencies shall keep adequate records to show:

(a) The number of employees who are white (not of hispanic origin), black (not of hispanic origin), hispanic, Asian or Pacific Islander, American Indian or Alaskan Native in each job category;

(b) The number of males and females in each racial group and job category; and

(c) The age of each employee in each job category.

(2) Records which fulfill the requirements of the U.S. equal employment opportunity commission recordkeeping requirements are sufficient to meet the requirements of this rule.

(3) Information about racial or ethnic identity may be acquired by visual survey of the work force and, if at all possible, should not be by direct inquiry. Such information shall be kept separately from other personnel records and shall be maintained as total numbers without identification of individuals.

(4) All personnel records made or kept by an employer, including, but not necessarily limited to, application forms and other records related to hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation and selection for training or apprenticeship, shall be preserved for 2 years from the date the record is made or from the date of the personnel action involved, whichever occurs later.

(5) If a discrimination complaint is filed, the respondent shall preserve all personnel records relevant to the complaint until final disposition of the complaint. Personnel records relevant to a complaint include personnel records relating to the complainant and to all other employees holding positions similar to that held or sought by the complainant and application forms or test papers completed by an unsuccessful applicant and all other candidates for the same position.

(6) Labor organizations shall preserve membership or referral records, including applications for membership or referral for 2 years from the date the records are made. If a discrimination complaint is filed, a labor organization shall preserve all records relevant to the complaint until final disposition of the complaint. (History: Sec. 49-2-204, 49-3-106 MCA; IMP, Sec. 49-2-102, 49-2-303, 49-3-201 MCA; NEW, Eff. 1/2/77; AMD, 1991 MAR p. 1841, Eff. 9/27/91.)

Sub-Chapter 9 reserved

## Sub-Chapter 10

## Sex Discrimination in Education

24.9.1001 PURPOSE (1) The purpose of this subchapter is to provide guidelines that will enable educational institutions to prevent and eliminate discrimination on the basis of sex. These rules are interpretive rules. The fact that a particular situation is not addressed in these rules shall not be construed to preclude a cause of action under the Montana Human Rights Act or the Governmental Code of Fair Practices. (History: This rule is advisory only but may be a correct interpretation of the law, Sec. 2-4-308, MCA, Eff. 10/1/83; Sec. 49-2-204, 49-3-106, MCA; IMP, Sec. 49-2-307 and 49-3-203, MCA; NEW, 1987 MAR p. 312, Eff. 3/27/87.)

24.9.1002 DEFINITIONS (1) "Admission" means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by an educational institution.

(2) "Auxiliary services" for students includes but is not limited to: health care, food services, playing fields, public accommodations on campus, speech therapy, remedial programs, mental health programs, and special programs.

(3) "Educational institution" means a public or private institution and includes an academy; college; elementary or secondary school; extension course; kindergarten; nursery; school system; university; business, nursing, professional, secretarial, technical or vocational school; or agent of an educational institution.

(4) "Extracurricular activity" includes school-sponsored or supported clubs, teams, or activities of general or specific interest not part of classroom instruction.

(5) "Housing accommodation" means a building or portion of a building whether constructed or to be constructed, which is or will be used as the sleeping quarters of its occupants.

(6) "Person" means one or more individuals, and includes applicants for admission as well as students.

(7) "Physical education activities involving bodily contact" means boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(8) "Public accommodation" means a place which is operated by an educational institution as defined in 49-2-101(17), MCA.



(9) "Sexual harassment" means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

(10) "Sexual intimidation" means any unreasonable behavior, verbal or nonverbal, which has the effect of subjecting members of either sex to humiliation, embarrassment or discomfort because of their gender.

(11) "Student" means a person who has gained admission and is currently engaged in the program of an educational institution. (History: This rule is advisory only but may be a correct interpretation of the law, Sec. 2-4-308, MCA, Eff. 10/1/83; Sec. 49-2-204, 49-3-106, MCA; IMP, Sec. 49-2-307 and 49-3-203, MCA; NEW, 1987 MAR p. 312, Eff. 3/27/87.)

24.9.1003 TREATMENT OF STUDENTS (1) Unless an exception is based on reasonable grounds, no student shall, on the basis of sex, be denied equal access to programs, extracurricular activities or services or benefits or be limited in the exercise of any right, privilege, advantage or opportunity.

(2) Because of the potential adverse impact upon female students of restrictions related to pregnancy or parental status, no student shall be discriminated against because of pregnancy or actual or potential parental status unless such action is based upon reasonable grounds.

(a) Unless an exception is based on reasonable grounds, pregnancy shall be treated as any other temporary disability.

(b) Unless an exception is based on reasonable grounds, pregnancy or parenthood shall not be considered cause for dismissal or exclusion from any program or activity.

(c) Participation in special programs provided for pregnant students or students who are parents shall be at the student's option.

(d) Educational institutions shall eliminate administrative and programmatic barriers to school attendance and school completion by pregnant students or students who are parents.

(e) Unless an exception is based on reasonable grounds, no student shall be discriminated against because of his or her actual or potential marital status.

(3) No student shall be subjected to sexual intimidation or harassment by any school employee, or by the effect of any school policy or practice when any employee or agent of the educational institution knew or reasonably should have known of the activity, policy or practice. No student shall be subject to sexual harassment

or sexual intimidation by another student on school-owned or controlled property or at any school sponsored or supervised functions or activities when any agent or employee of the educational institution knew or reasonably should have known of the activity. (History: This rule is advisory only but may be a correct interpretation of the law, Sec. 2-4-308, MCA, Eff. 10/1/83; Sec. 49-2-204, 49-3-106, MCA; IMP, Sec. 49-2-307 and 49-3-203, MCA; NEW, 1987 MAR p. 312, Eff. 3/27/87.)

24.9.1004 ADMISSIONS (1) Unless an exception is based on reasonable grounds, no person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by an educational institution.

(2) In determining whether a person has satisfied any policy or criterion for admission, or in making any offer of admission, an educational institution shall not:

(a) give preference to one person over another on the basis of sex by ranking applicants separately on such basis, or otherwise;

(b) apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(c) otherwise treat one individual differently from another on the basis of sex.

(3) An educational institution shall not administer or require any test or apply any other criterion as the sole basis for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question. An exception to this rule may exist if it can be shown that alternative tests or criteria which do not have such a disproportionately adverse effect are unavailable.

(4) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, an educational institution shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes.

(5) An educational institution may make pre-admission inquiry as to the sex of an applicant for admission, but only if the inquiry is made equally of applicants of both sexes and if the results of the inquiry are not used in connection with discrimination prohibited by this part. Information relating to the sex of an individual that is obtained by the educational institution for statistical purposes may not be used in any admission determination.

(History: This rule is advisory only but may be a correct interpretation of the law, Sec. 2-4-308, MCA, Eff. 10/1/83; Sec. 49-2-204, 49-3-106, MCA; IMP, Sec. 49-2-307 and 49-3-203, MCA; NEW, 1987 MAR p. 312, Eff. 3/27/87.)

24.9.1005 GUIDANCE AND COUNSELING SERVICES (1) Unless an exception is based on reasonable grounds, school personnel assigned to provide guidance and counseling services, and all materials used in the provision of those services, shall, without regard to their sex, encourage students to explore and develop their individual interests in vocational programs, employment, and educational opportunities. This may include encouraging students to consider nontraditional occupations, careers and educational courses or programs.

(History: This rule is advisory only but may be a correct interpretation of the law, Sec. 2-4-308, MCA, Eff. 10/1/83; Sec. 49-2-204, 49-3-106, MCA; IMP, Sec. 49-2-307 and 49-3-203, MCA; NEW, 1987 MAR p. 312, Eff. 3/27/87.)

24.9.1006 ACCESS TO COURSE OFFERINGS AND ACTIVITIES

(1) Unless an exception is based on reasonable grounds, an educational institution shall not provide any course or otherwise carry out any of its educational programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music and adult education courses.

(2) This rule does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) This rule does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports, the purpose or major activity of which involves bodily contact.

(4) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the educational institution shall use appropriate standards which do not have such effect.

(5) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(6) Educational institutions may make requirements based on vocal range or quality which may result in a chorus

or choruses of one or predominantly one sex. (History: This rule is advisory only but may be a correct interpretation of the law, Sec. 2-4-308, MCA, Eff. 10/1/83; Sec. 49-2-204, 49-3-106, MCA; IMP, Sec. 49-2-307 and 49-3-203, MCA; NEW, 1987 MAR p. 312, Eff. 3/27/87.)

24.9.1007 TEXTBOOKS AND INSTRUCTIONAL MATERIALS

(1) Textbooks and instructional materials are part of an educational program and as such are considered to be part of the terms and conditions or privileges provided by an educational institution under the Montana Human Rights Act and the Governmental Code of Fair Practices. Nothing in these rules shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or instructional materials. However, the commission encourages educational institutions to utilize textbooks and instructional materials that portray males and females in a wide variety of occupational, emotional and behavioral situations and in the full range of their human potential. (History: This rule is advisory only but may be a correct interpretation of the law, Sec. 2-4-308, MCA, Eff. 10/1/83; Sec. 49-2-204, 49-3-106, MCA; IMP, Sec. 49-2-307 and 49-3-203, MCA; NEW, 1987 MAR p. 312, Eff. 3/27/87.)

24.9.1008 EXTRACURRICULAR AND ATHLETIC ACTIVITIES

(1) Unless based on reasonable grounds, no person, on the basis of sex, shall be denied equality of opportunity to participate in extracurricular activities and athletics sponsored by an educational institution.

(2) In determining whether equality of opportunity is available, the factors to be considered, among others, are:

(a) whether the selection of sports and levels of competition effectively accommodates the interests and abilities of both sexes;

(b) the provision of equipment, supplies and services;

(c) scheduling of games and practice times;

(d) travel and per diem allowances;

(e) opportunity to receive coaching and academic tutoring;

(f) qualifications, assignment and compensation of coaches, officials, and tutors;

(g) provision of locker rooms, practice and competitive facilities;

(h) provision of medical and training facilities and services;

(i) provision of housing and dining facilities and services, and;

(j) publicity.

(History: This rule is advisory only but may be a correct interpretation of the law, Sec. 2-4-308, MCA, Eff. 10/1/83; Sec. 49-2-204, 49-3-106, MCA; IMP, Sec. 49-2-307 and 49-3-203, MCA; NEW, 1987 MAR p. 312, Eff. 3/27/87.)

24.9.1009 FINANCIAL AID (1) Unless an exception is based on reasonable grounds, no person shall, on the basis of sex, be limited or denied financial assistance from an educational institution.

(2) To the extent that an educational institution awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics. (History: This rule is advisory only but may be a correct interpretation of the law, Sec. 2-4-308, MCA, Eff. 10/1/83; Sec. 49-2-204, 49-3-106, MCA; IMP, Sec. 49-2-307 and 49-3-203, MCA; NEW, 1987 MAR p. 312, Eff. 3/27/87.)

24.9.1010 HOUSING AND AUXILIARY SERVICES FOR STUDENTS

(1) Unless an exception is based on reasonable grounds, an educational institution shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements or different services or benefits related to housing and auxiliary services.

(2) An educational institution may provide separate housing and auxiliary services on the basis of sex so long as the housing and auxiliary services provided to students of the other sex, be, as a whole, and to the extent reasonably attainable by the institution, proportionate in quantity and comparable in quality and cost to the student. Students shall be provided equal access and equal treatment.

(History: This rule is advisory only but may be a correct interpretation of the law, Sec. 2-4-308, MCA, Eff. 10/1/83; Sec. 49-2-204, 49-3-106, MCA; IMP, Sec. 49-2-307 and 49-3-208, MCA; NEW, 1987 MAR p. 312, Eff. 3/27/87.)

24.9.1011 EMPLOYMENT ASSISTANCE/PLACEMENT (1) Unless an exception is based on reasonable grounds, an educational institution which assists an agency, organization or person in making employment available to any of its students shall obtain assurances that such employment is made available without discrimination on the basis of sex.

(2) An educational institution that makes school facilities available to or otherwise assists an agency, person, or organization known to engage in unlawful employment discrimination furthers and sanctions the

discriminatory practice. (History: This rule is advisory only but may be a correct interpretation of the law, Sec. 2-4-308, MCA, Eff. 10/1/83; Sec. 49-2-204, 49-3-106, MCA; IMP, Sec. 49-2-307, 49-3-202, and 49-3-205, MCA; NEW, 1987 MAR p. 312, Eff. 3/27/87.)

## Sub-Chapter 11

## Interpretive Rules

24.9.1101 COVERAGE; ALIENS (REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-101 MCA; NEW, Eff. 1/4/75; REP, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.1102 COVERAGE; INSURANCE COMPANIES (REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-306 MCA; NEW, Eff. 1/2/77; REP, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.1103 PRINTED MATTER FOR PUBLIC ACCOMMODATIONS; WHEN DISCRIMINATION PERMITTED (REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-102, 49-2-303, 49-2-304, 49-2-305 MCA; NEW, Eff. 1/4/75; REP, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.1104 REAL PROPERTY TRANSACTIONS; WHEN DISCRIMINATION PERMITTED (REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-304 MCA; NEW Eff. 1/4/75; REP, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.1105 EDUCATIONAL INSTITUTIONS; WHEN DISCRIMINATION PERMITTED (REPEALED) (History: Sec. 15-2-1706 MCA; IMP, Sec. 49-2-307, 49-2-308 MCA; NEW, Eff. 1/4/75; REP, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.1106 BURDEN OF PROOF (REPEALED) (History: Sec. 2-15-1706 MCA; IMP, Sec. 49-2-303, 49-2-304, 49-2-305, 49-2-306, 49-2-308, 49-2-307, 49-2-301(1), 49-2-402, 49-2-401, 49-2-102 MCA; NEW, Eff. 1/4/75; REP, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.1107 REAL PROPERTY TRANSACTIONS; AGE DISCRIMINATION (REPEALED) (History: Sec. 2-15-1706, 49-2-204 MCA; IMP, 49-2-305 MCA; NEW, 1985 MAR p. 1399, Eff. 7/1/87; REP, 1987 MAR p. 1094, Eff. 4/17/87.)

## Sub-Chapter 12

## MATERNITY LEAVE RULES

24.9.1201 DEFINITIONS "Disability as a result of pregnancy" includes any condition certifiable by a medical doctor as disabling, whether the condition arises as a result of the normal course of pregnancy, or as a result of abnormal medical conditions which occur in the course of a pregnancy, and may cover the time period beginning with conception through termination of gestation and a reasonable period for recovery therefrom.

(2) "Maternity leave" means any leave of absence granted to or required of an employee because of such employee's disability due to pregnancy. (History: Sec. 2-15-1706 MCA; IMP, 49-2-310 and 49-2-311 MCA; NEW, 1984 MAR p. 1369, Eff. 9/14/84.)

24.9.1202 TERMINATION OF EMPLOYMENT DUE TO PREGNANCY PROHIBITED Section 49-2-310(1), MCA provides that it is unlawful for an employer or his agent to terminate a woman's employment because of her pregnancy. For purposes of this provision, "terminations" shall include all involuntary dismissals, all resignations in which the employees' resignation was required by the employer or permitted as the sole alternative to dismissal and those situations in which the totality of the circumstances surrounding a resignation by an employee indicate that the resignation was compelled by the conduct or policy of the employer or agent. Coercive conduct by an employer or his agent toward an employee in order to secure her resignation, when the employee's pregnancy constitutes a substantial reason for the conduct, shall be considered a violation of this provision. (History: Sec. 2-15-1706 MCA; IMP, 49-2-310 and 49-2-311 MCA; NEW, 1984 MAR p. 1369, Eff. 9/14/84.)

24.9.1203 RIGHT TO REASONABLE LEAVE OF ABSENCE Section 49-2-310(2), MCA provides that it is unlawful for an employer or his agent to refuse to grant to an employee a reasonable leave of absence for pregnancy. In determining the standards of reasonableness which shall apply to a request for a leave of absence for a pregnancy, an employer shall apply standards at least as inclusive as those which he applies to requests for leave of absence for any other valid medical reason. (History: Sec. 2-15-1706 MCA; IMP., 49-2-310 and 49-2-311 MCA; NEW, 1984 MAR p. 1369, Eff. 9/14/84.)



24.9.1204 MANDATORY LEAVE FOR UNREASONABLE LENGTH OF TIME PROHIBITED Section 49-2-310(5), MCA provides that no employer may require an employee to take a mandatory maternity leave for an unreasonable length of time. The reasonableness of the length of time for which an employee is required to take a mandatory maternity leave shall be determined on a case by case basis. However, the employer shall have the burden of proving that a maternity leave for a period of time other than that prescribed by the employee's medical doctor is reasonable, and in no case shall an employee be required to take an uncompensated maternity leave for a longer period of time than a medical doctor who has actually examined the employee shall certify that the employee is unable to perform her employment duties. Neither this section nor any other section of these regulations shall prohibit an employer and employee from mutually agreeing, in the case of the particular employee, to a longer period of maternity leave, either compensated or uncompensated than would be required by this regulation. However, no employer may enter into a general agreement with any group or association of employees which requires a longer period of mandatory maternity leave than is permitted by this regulation. (History: Sec. 2-15-1706 MCA; IMP, 49-2-310 and 49-2-311 MCA; NEW, 1984 MAR p. 1369, Eff. 9/14/84.)

24.9.1205 VERIFICATION OF DISABILITY In any case where an employee makes a claim against her employer for any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer, including any insurance or other disability plans referred to in 24.9.1206 and the claim is based on a disability covered by and defined in Title 49, Chapter 2, MCA, and these regulations, the employer may require that the disability be verified by medical certification by a physician competent to treat and diagnose the particular disability, that the employee is, or at the time for which the claim is made, was unable to perform her employment duties. For purposes of obtaining this medical certification the employer may require that the claimant submit to a physical or mental examination by a medical doctor to verify the claimed disability by medical certification. (History: Sec. 2-15-1706 MCA; IMP, 49-2-310 and 49-2-311 MCA; NEW, 1984 MAR p. 1369, Eff. 9/14/84.)

24.9.1206 PREGNANCY-RELATED DISABILITIES TO BE TREATED AS TEMPORARY DISABILITIES Disabilities as a result of a pregnancy, childbirth or related medical condition are for

all job-related purposes, temporary disabilities and shall not be treated less favorably than other temporary disabilities under any health, medical, or temporary disability insurance plan or sick leave plan maintained by employer. The question of maintenance is one of fact which will be judged upon all of the evidence. No written or unwritten employment policies or practices involving matters such as commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement or payment under any health, medical, or temporary disability insurance plan, or under any sick leave, disability leave or disability benefit plan whatsoever, whether formal or informal, shall be applied to disability due to pregnancy, on terms or conditions less favorable than those applied to other temporary disabilities. (History: Sec. 2-15-1706 MCA; IMP, 49-2-310 and 49-2-311 MCA; NEW, 1984 MAR p. 1369, Eff. 9/14/84.)

24.9.1207 RETURN TO EMPLOYMENT AFTER MATERNITY LEAVE

Section 49-2-311, MCA requires that an employee who has signified her intent to return at the end of her maternity leave of absence shall be reinstated to her original job or an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other service credits unless, in the case of a private employer, the employer's circumstances have so changed as to make it unreasonable or impossible to do so. (History: Sec. 2-15-1706 MCA; IMP, 49-2-310 and 49-2-311 MCA; NEW, 1984 MAR p. 1370, Eff. 9/14/84.)

## Sub-Chapter 13

## Insurance and Retirement Plans

24.9.1301 DEFINITIONS (1)(1) The term "insurer" as used in this sub-chapter means any financial institution or person, as those terms are defined in 49-2-101, MCA, that issues, operates, sells or otherwise provides any type of insurance policy, plan, or coverage or any pension or retirement plan, program, or coverage to another person or persons, except that an employer or organization which provides to its employees or members a group insurance policy, plan, or coverage or pension or retirement plan, program, or coverage purchased from or provided by an insurer is not an insurer. (History: Sec. 49-2-204 MCA; IMP, Sec. 49-2-309 MCA, NEW, 1985 MAR p. 1615, Eff. 11/1/85.)

24.9.1302 RATES AND PREMIUMS; PROPERTY AND CASUALTY INSURANCE

(1) Rates or premiums for any property or casualty insurance policy, plan, or coverage on a risk, when the risk is resident, located, or to be performed in the state of Montana shall not be based on sex or marital status.

(2) Factors which an insurer may take into account to determine rates or premiums for motor vehicle liability and property coverage include, but are not limited to:

- (a) The age of the driver.
- (b) The length of driving experience.
- (c) The number of years licensed to operate a motor vehicle.
- (d) A determination of which driver, among several insured individuals, is the primary driver of a covered vehicle, based upon the proportionate use of each vehicle insured under the policy by individual drivers insured or to be insured under the policy.
- (e) Average number of miles driven over a period of time.
- (f) Type of use, such as business, farm, or pleasure use.
- (g) Vehicle characteristics, features, and options such as engine displacement, ability of vehicle and its equipment to protect passengers from injury, vehicle make and model, and design characteristics related to damagability of the vehicle.
- (h) Commuting mileage over a period of time.
- (i) The number of cars insured or number of licensed operators in the household, without regard to the sex or marital status of the licensed operators. An insurer may not utilize a policy of establishing insurance rates for an individual based upon the driving record of a spouse who is a

licensed operator but not a primary driver of the vehicle to be insured unless the policy is applied in the same manner to households of individuals not married to each other.

(j) The amount of insurance.

(k) The anticipated cost of vehicle repairs or replacement, which may be measured by age, price, cost, or value of the insured automobile, and other related factors.

(l) Geographic location.

(m) The accident record of the insured, including accidents for which the insured, although not cited, was substantially at fault.

(n) The driving record of the insured, including citations. (History: Sec. 49-2-204 MCA; IMP, Sec. 49-2-309 MCA; NEW, 1985 MAR p. 1615, Eff. 11/1/85.)

24.9.1303 RATES AND PREMIUMS; LIFE, DISABILITY, AND HEALTH INSURANCE, ANNUITIES, AND PENSION AND RETIREMENT PLANS, PROGRAMS, AND COVERAGES (1) Rates or premiums for life, disability, and health insurance policies, plans, and coverages, including annuities and pension and retirement plans, programs, and coverages, issued, delivered, or issued for delivery in the state of Montana shall not be based on sex or marital status.

(2) Factors which an insurer may take into account to determine rates or premiums for a life, disability, or health insurance policy, plan, program, or coverage, include but are not limited to age, weight, general health, personal habits such as smoking or other use of tobacco, consumption of alcoholic beverages, and the hazardous nature of work or recreation engaged in by the insured. (History: Sec. 49-2-204 MCA; IMP, Sec. 49-2-309 MCA; NEW, 1985 MAR p. 1615, Eff. 11/1/85.)

24.9.1304 PAYMENTS OR BENEFITS (1) No payments or benefits or any insurance policy, plan or coverage or pension or retirement plan, program, or coverage shall be based on sex or marital status. (History: Sec. 49-2-204 MCA; IMP, Sec. 49-2-309 MCA; NEW, 1985 MAR p. 1615, Eff. 11/1/85.)

24.9.1305 JURISDICTION AND APPLICABILITY DATE (1) Section 49-2-309, MCA, and this sub-chapter are applicable to all insurance policies, plans, and coverages and pension or retirement plans, programs or coverages and pension or retirement plans, programs or coverages subject to the laws of Montana and issued or entered into on or after October 1, 1985.

(2) Any term, payment, or benefit of an insurance policy, plan, or coverage or pension or retirement plan, program or coverage in effect prior to October 1, 1985, may be

exercised in accordance with the terms of that policy, plan, program, or coverage. Options to increase or decrease coverage, annual rate adjustments and settlement options in life insurance policies are examples of terms which if included in a policy, plan, program or coverage in effect prior to October 1, 1985, may be exercised without regard to §49-2-309, MCA or these rules.

(3) In determining if a policy, plan, program, or coverage was in effect prior to October 1, 1985, the primary consideration will be whether a new contract is formed on or after October 1, 1985, or whether a pre-October 1 contract is continued after that date.

(4) Section 49-2-309, MCA, and these rules, are applicable to any agreement whereby an insurer and an insured agree to an extension or continuation of a pre-October 1, 1985 insurance policy, plan, or coverage or pension or retirement plan, program, or coverage when no consideration was given in the pre-October 1, contract for the right to extend or continue upon the same terms. The fact that the contract formed by extension or continuation is identical to the pre-October 1, 1985 contract is not material if no consideration for the right to extend or continue the pre-October 1 terms was given.

(5) Section 49-2-309, MCA, and these rules do not apply to any insurance policy, plan, or coverage or pension or retirement plan, program or coverage issued to or provided to a person who reside in a state other than Montana at the time the policy, plan, program or coverage became effective. (History: Sec. 49-2-204 MCA; IMP, Sec. 49-2-309 MCA; NEW, 1985 MAR p. 1615, Eff. 11/1/85.)

## Sub-Chapter 14

## Guidelines For Employment

24.9.1401 GENERAL PRINCIPLES (IS HEREBY REPEALED) (History: 2-15-1706, MCA; IMP, 49-2-102, 49-2-303, 49-2-401, MCA, NEW, Eff. 1/4/75; REP, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.1402 SEX DISCRIMINATION AS A REASONABLE DEMAND OF EMPLOYMENT (IS HEREBY REPEALED) (History: 2-15-1706, MCA; IMP, 49-2-102, 49-2-303, 49-2-401, MCA; NEW, Eff. 1/2/77; REP, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.1403 AGE DISCRIMINATION AS A REASONABLE DEMAND OF EMPLOYMENT (IS HEREBY REPEALED) (History: 2-15-1706, MCA; IMP, 49-2-102, 49-2-303, 49-2-401, MCA; NEW, Eff. 1/4/75; REP, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.1404 PHYSICAL HANDICAP DISCRIMINATION AS A REASONABLE DEMAND OF EMPLOYMENT (IS HEREBY REPEALED) (History: 2-15-1706, MCA; IMP, 49-2-102, 49-2-303, 49-2-401, MCA; NEW, Eff. 1/4/75; REP, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.1405 MENTAL HANDICAP DISCRIMINATION AS A REASONABLE DEMAND OF EMPLOYMENT (IS HEREBY REPEALED) (History: 2-15-1706, MCA; IMP, 49-2-102, 49-2-303, 49-2-401, MCA; NEW, Eff. 1/4/75; REP, 1996 MAR p. 2871, Eff. 10/25/96.)

24.9.1406 PRE-EMPLOYMENT INQUIRIES (1) Any pre-employment inquiry made in connection with prospective employment which elicits information regarding race, color, national origin, religion, creed, physical or mental disability, age, sex, marital status or, in the case of government employment, political beliefs, shall raise a suspicion of intent to unlawfully discriminate except when:

(a) the inquiry is required for implementation of a bona fide lawful affirmative action plan,

(b) the inquiry is required by court ordered or other government reporting or record-keeping requirements or

(c) in the case of an inquiry concerning age, physical or mental disability, marital status or sex, the reasonable demands of the position (bona fide occupational qualifications) require an age, physical or mental disability, marital status or sex distinction.

(2) Whether or not any pre-employment inquiry is actually unlawful depends upon whether the inquiry was intended to be used or was used to unlawfully discriminate. The following pre-employment inquiries may raise a suspicion that the employer intends to use the information to unlawfully discriminate and, therefore, should not be asked at any time during the hiring process, including, but not limited to, on application forms and during interviews. The list contains suspect pre-employment inquiries followed, when appropriate, by examples of lawful inquiries regarding the same information.

(a) General inquiry regarding race, color, national origin, religion, creed, physical or mental disability, age, sex or marital status and, in the case of governmental employers only, political beliefs.

(b) Inquiry regarding original name. It is lawful to inquire regarding change of name for purposes of checking employment and education records.

(c) Inquiry regarding residency which requests information indicating birthplace or place of foreign citizenship, former or present. It is lawful to inquire regarding present address, previous address in the U.S. and duration of residency in a particular city, county or state.

(d) When age is a bona fide occupational qualification, an inquiry which requires that age be proven by birth certificate or baptismal record. When age is a bona fide occupational qualification, it is lawful to require that age be proven by a record which does not indicate national origin, ancestry or religion.

(e) Inquiry regarding skin, hair or eye color.

(f) Requirement of a photograph or a request for one, at the applicant's option.

(g) Inquiry regarding military experience outside the U.S. armed forces.

(h) Inquiry regarding criminal arrests. It is lawful to inquire regarding criminal convictions.

(i) Inquiry regarding native language, or the manner in which a foreign language was acquired. It is lawful to inquire regarding foreign languages spoken and degree of fluency.

(j) General inquiry regarding membership in organizations. It is lawful to inquire regarding membership in organizations the names of which do not indicate race, color, national origin, religion, creed, physical or mental disability, age, sex or marital status. Additionally, government employers should not inquire regarding membership in organizations the names of which indicate political beliefs.

- (k) Inquiry regarding names of relatives.
- (l) Inquiry regarding garnishment record.
- (m) General inquiry regarding physical or mental condition. It is lawful to make necessary and job-related inquiries regarding specific physical or mental conditions required by the reasonable demands of the position.
- (n) Inquiry regarding pregnancy or childbearing plans.
- (o) Inquiry of applicants of only one sex regarding childcare arrangements.
- (p) Inquiry regarding citizenship.
- (q) Inquiry regarding height and weight.
- (3) Information necessary for tax, insurance, social security, compliance with garnishment or immigration laws or other legitimate business purposes may be obtained after employment. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-303 and 49-3-201, MCA; NEW, Eff. 1/4/75; AMD, 1991 MAR p. 1841, Eff. 9/27/91; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.1407 ADOPTION OF EEOC SEX DISCRIMINATION GUIDELINES (1)

The human rights commission hereby affirms its adoption of the Guidelines on Sex Discrimination promulgated by the United States equal employment opportunity commission, as last revised as of July 1, 1998. The guidelines are codified as Title 29 CFR, chapter XIV, part 1604, including the appendix. A copy of the guidelines may be obtained from the human rights bureau, department of labor and industry. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-102, 49-2-303, and 49-2-401, MCA; NEW, Eff. 1/2/77; AMD, 1983 MAR p. 329, Eff. 6/1/83; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.1408 ADOPTION OF EEOC RELIGIOUS DISCRIMINATION GUIDELINES

(1) The human rights commission hereby affirms its adoption of the Guidelines on Religious Discrimination promulgated by the United States equal employment opportunity commission, as last revised as of July 1, 1998. The guidelines are codified as Title 29 CFR, chapter XIV, part 1605, including the appendix. A copy of the guidelines may be obtained from the human rights bureau, department of labor and industry. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-102, 49-2-303, and 49-2-401, MCA; NEW, Eff. 1/2/77; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)



24.9.1409 ADOPTION OF EEOC NATIONAL ORIGIN DISCRIMINATION GUIDELINES (1) The human rights commission hereby affirms its adoption of the Guidelines on National Origin Discrimination promulgated by the United States equal employment opportunity commission, as last revised as of July 1, 1998. The guidelines are codified as Title 29 CFR, chapter XIV, part 1606. A copy of the guidelines may be obtained from the human rights bureau, department of labor and industry. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-102, 49-2-203, and 49-2-401, MCA; NEW, Eff. 1/2/77; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.1410 ADOPTION OF EEOC GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1) The human rights commission hereby affirms its adoption of the Uniform Guidelines on Employee Selection Procedures, including their appendix, "Policy Statement on Affirmative Action" promulgated by the United States equal employment opportunity commission as last revised as of July 1, 1998. The guidelines are codified as Title 29 CFR, chapter XIV, part 1607, including the appendix. A copy of the guidelines may be obtained from the human rights bureau, department of labor and industry. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-102, 49-2-303, and 49-2-401, MCA; NEW, Eff. 1/2/77; AMD, 1980 MAR p. 1137, Eff. 4/11/80; AMD, 1980 MAR p. 1711, Eff. 6/27/80; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.1411 EEOC GUIDELINES READ IN CONJUNCTION WITH COMMISSION INTERPRETIVE RULES (1) The guidelines promulgated by the United States equal employment opportunity commission and adopted by the human rights commission are to be read together and in conjunction with the provisions of ARM 24.9.1401 through 24.9.1412, the guidelines for employment adopted by the human rights commission. (History: 2-15-1706, MCA; IMP, 49-2-102, 49-2-203, MCA; NEW, Eff. 1/2/77.)

24.9.1412 ADOPTION OF EEOC AFFIRMATIVE ACTION GUIDELINES (1) The human rights commission hereby affirms its adoption of the Affirmative Action Guidelines promulgated by the United States equal employment opportunity commission as last revised as of July 1, 1998. The guidelines are codified as Title 29 CFR, chapter XIV, part 1608. A copy of the guidelines may be obtained from the human rights bureau, department of labor and industry. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-303, MCA; NEW, 1980 MAR p. 1712, Eff. 6/27/80; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

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## Sub-Chapter 15

## Housing Discrimination Procedures And Definitions

24.9.1501 PURPOSE AND SCOPE OF RULES (1) The following rules describe the procedures and definitions followed by the department and commission in investigating and resolving complaints of housing discrimination filed before July 1, 1997. Except as otherwise provided in this sub-chapter, ARM 24.9.101 through 24.9.331 also apply to the procedure for housing complaints. (History: 49-2-204, MCA; IMP, 49-2-305 and 49-2-510, MCA; NEW, 1991 MAR p. 2488, Eff. 12/13/91; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.1502 DEFINITIONS (1) "Child" means an individual who has not attained the age of 18 and who is domiciled with:

(a) A parent or another person having legal custody of the individual; or

(b) The designee of a parent, other person or entity having custody, with the written permission of the parent, other person or entity.

(2) "Familial status" - The protections afforded against discrimination on the basis of familial status shall also apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

(3) "Housing for older persons" - The determination as to whether housing under any state or federal program is specifically designed and operated to assist elderly persons shall be made by the department, commission or the United States department of housing and urban development. (History: 49-2-204, MCA; IMP, 49-2-305, MCA; NEW, 1991 MAR p. 2488, Eff. 12/13/91; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.1503 EXEMPTIONS (1) Lawful discrimination in housing under 49-2-403, MCA for the purpose of correcting a previous discriminatory practice must conform to legal standards justifying affirmative action.

(2) Lawful age or disability discrimination in housing under 49-2-403, MCA based upon capacity to make or be bound by contracts or other obligations must be legally justified by current legal standards regarding capacity to make or be bound by contracts.

(3) Any person or entity asserting entitlement to an exemption under 49-2-403, MCA has the burden of proving justification for discrimination. (History: 49-2-204, MCA; IMP, 49-2-305 and 49-2-403, MCA; NEW, 1991 MAR p. 2488, Eff. 12/13/91; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.1504 COMPLAINTS AND ANSWERS (IS HEREBY REPEALED)  
(History: 49-2-204, MCA; IMP, 49-2-305, 49-2-510, MCA; NEW, 1991 MAR p. 2488, Eff. 12/13/91; REP, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.1505 INVESTIGATION (IS HEREBY REPEALED) (History: 49-2-204, MCA; IMP, 49-2-305, 49-2-510, MCA; NEW, 1991 MAR p. 2488, Eff. 12/31/91; REP, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.1506 CONCILIATION (1) A conciliation agreement shall be a written agreement between the respondent and the complainant, and shall be subject to approval of the department on behalf of the commission.

(2) Conciliation agreements shall be made public unless the charging party and the respondent otherwise agree and the department or commission determines that the agreement involves a privacy interest entitled to protection by law. (History: 49-2-204, MCA; IMP, 49-2-305 and 49-2-510, MCA; NEW, 1991 MAR p. 2488, Eff. 12/13/91; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.1507 REPRESENTATION OF CHARGING PARTY (1) In any case in which the department has determined after investigation that there is substantial evidence that a discriminatory housing practice has occurred (reasonable cause finding), it shall provide representation for the charging party in any contested case hearing unless the charging party waives the representation. (History: 49-2-204, MCA; IMP, 49-2-305 and 49-2-510, MCA; NEW, 1991 MAR p. 2488, Eff. 12/13/91; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.1508 FINAL DISPOSITION (1) The department and commission shall make a final administrative disposition of a complaint alleging a discriminatory housing practice within one year after the complaint is filed unless it is impracticable to do so. If the department and commission are unable to make a final administrative disposition within one year, the department shall notify the charging party and respondent in writing of the reasons for not doing so. (History: 49-2-204, MCA; IMP, 49-2-305 and 49-2-510, MCA; NEW, 1991 MAR p. 2488, Eff. 12/13/91; AMD, 1998 MAR p. 3201, Eff. 12/4/98.)

Sub-Chapter 16 reserved

## Sub-Chapter 17

## Appeals To The Commission

24.9.1701 PURPOSE AND SCOPE OF RULES (1) The purpose of the rules in this sub-chapter is to set forth the procedures the commission will follow for hearing party objections to dismissal of cases under 49-2-509(4), MCA and appeals of final orders under 49-2-505(4), MCA. These rules apply only to complaints of discrimination filed on or after July 1, 1997.

(2) The commission will construe the provisions of the act, the code, and these rules in a reasonable manner. A principal objective of the act and code is to ensure that there will be no illegal discrimination in Montana.

(3) The commission may suspend, waive or modify these rules for good cause to expedite decision, prevent manifest prejudice to a party, assure a fair hearing, or afford substantial justice. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-204, 49-2-205, 49-2-501, 49-2-504, 49-2-505, and 49-2-509, MCA; NEW, 1998 MAR p. 3201, Eff. 12/4/98.)

Rule 24.9.1702 reserved

24.9.1703 DOCUMENT FORMAT, FILING AND SERVICE (1) All documents, pleadings, and papers to be filed shall be eight and one-half inches by eleven inches (8½" x 11") in size and clearly legible. Exhibits or other documents shall be reproduced in like size unless the original exhibit is required. The commission may require the reproduction of an oversized demonstrative or other exhibit in a size appropriate for the record.

(2) The place of filing is the offices of the Human Rights Bureau, Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624-1728. The offices are located at 616 Helena Avenue, Suite 302, Steamboat Block, Helena, Montana. The telephone number is (406) 444-2884; FAX (406) 444-2798; TTY (406) 444-0532.

(3) Filing with the commission is effective upon actual receipt at the offices of the department and not upon mailing.

(4) Parties shall submit the original (or original copy) and six copies of all submissions for the record, unless otherwise directed by the commission.

(5) Copies of all submissions filed must be served upon all parties of record, including intervenors or other parties allowed to appear for special purposes, and all submissions must contain or be accompanied by a certificate of service showing proof of the method of service and the date upon which such service was made. Service of copies of submissions upon parties shall be made in accordance with Rule 5 of the Montana Rules of Civil Procedure and may be made by means of first class mail, postage prepaid, unless the commission designates another manner of service.

(6) Filing of a facsimile copy of a document of no more than 20 pages, which is an exact duplicate of the original, shall meet the filing requirements of these rules only if the facsimile copy is followed within five days by filing of the original or original copy of the document and required copies. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-106, 49-2-204, 49-2-505, and 49-2-509, MCA; NEW, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.1704 TIME (1) In accordance with Rule 6(a) of the Montana Rules of Civil Procedure, in computing any period of time for acts required by any of the commission's rules, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is included unless it is a Saturday, Sunday, legal holiday, or the department offices are closed on such day. In that event, the period runs until the end of the next day when the department offices are open which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and holidays are excluded in computation. A half holiday will be considered as other days and not as a holiday.

(2) In accordance with Rule 6(d) of the Montana Rules of Civil Procedure, whenever a party has a right or is required to do some act under any of the commission's rules within a prescribed period after service of a notice or other paper upon the party and service is by mail, three days shall be added to the prescribed period. The date of service is computed from the date on which service is made by mail, as shown by the certificate of service or date of mailing. Service by mail is complete upon mailing.

(3) Except as to dates fixed by statute and not subject to modification, the commission may enlarge the time to perform an act. In accordance with Rule 6(b) of the Montana Rules of Civil Procedure, the time may be enlarged for cause shown, with or without a motion or notice, when a request for enlargement of time is made prior to the expiration of the time in which the act is to be performed. If the request is made after the expiration of the specified period in which to act, enlargement may be allowed only upon a showing of excusable neglect in the failure to act. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-204, 49-2-505, and 49-2-509, MCA; NEW, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.1705 JURISDICTION TO CONSIDER JURISDICTION (1) The commission shall, at all times, have jurisdiction to determine the jurisdiction of the commission and the department over any particular contested case. In such situations the rules of procedure of the commission shall apply, and questions of jurisdiction may be resolved by rulings and orders based upon the pleadings or after a hearing, as required to suit the circumstances of the case. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-204, 49-2-505, and 49-2-509, MCA; NEW, 1998 MAR p. 3201, Eff. 12/4/98.)

Rules 24.9.1706 through 24.9.1710 reserved

24.9.1711 DISQUALIFICATION OF A MEMBER OF THE COMMISSION (1) A party may disqualify a member of the commission from presiding over any matter governed by these rules only upon an affirmative showing, made in good faith, of personal bias, a lack of independence, disqualification by law or other ground for disqualification allowed by law.

(2) A party seeking to disqualify a member of the commission may do so only upon the filing of a motion which is supported by a sufficient affidavit showing the particular facts and matters which constitute good cause for disqualification under (1). The party must file the motion and affidavit within ten days of service of the notice of objection or appeal.

(3) Following the filing of a motion and affidavit of disqualification and a reasonable period of time for an opposing party to comment upon it, the commission shall either enter an order of recusal or decline the member's disqualification. That order must specify the particular facts and grounds upon which it is based.

(4) The question of disqualification shall be determined by a quorum of the commission, which may include the member of the commission to be disqualified if his or her participation is required to constitute a quorum or decide the matter.

(5) A member of the commission may make an order or give a notice of recusal or self-disqualification at any time. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-611, 49-2-204, 49-2-505, and 49-2-509, MCA; NEW, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.1712 EX PARTE COMMUNICATIONS (1) No member of the commission may participate in or initiate any ex parte communication as defined in (2) on the merits of a matter with any party or the department. A member of the commission may engage in a communication concerning administrative or procedural matters where they are necessary under the circumstances and do not adversely affect the substantial rights of a party.

(2) "Ex parte communication" means the act of a party to a contested case, any employee of the department, any person having an interest in the outcome of a contested case or any other person not authorized by law, communicating with a member of the commission regarding the merits of any contested case. Communications which do not constitute discussions or information regarding an issue of fact or law in a contested case, such as discussions of enlargements of time, scheduling, administrative matters and/or questions of procedure do not constitute ex parte communications.

(3) The commission may consult with any person not a party to the pending matter, or with the department regarding the interpretation of a point of law. (History: 49-2-204 and 49-3-106, MCA; IMP, 2-4-613, 49-2-204, 49-2-505, and 49-2-509, MCA; NEW, 1998 MAR p. 3201, Eff. 12/4/98.)

Rule 24.9.1713 reserved

24.9.1714     OBJECTIONS TO DISMISSAL OF COMPLAINT OR REFUSAL TO DISMISS COMPLAINT (1) A party who is dissatisfied with a department decision to dismiss a complaint or to refuse to dismiss a complaint pursuant to 49-2-509, MCA, may seek commission review of the decision by filing a written objection within 14 days after the decision is served. Briefs are not required. A party who makes an objection and wishes to file a supporting brief must file and serve an original and six copies of the brief within five days of filing the objection. Any opposing party who wishes to file an answer brief must file and serve an original and six copies of the brief within ten days of service of the initial brief. A party making an objection who wishes to file a reply brief must file and serve an original and six copies of the brief within ten days of service of an answer brief. If a party making an objection does not file a supporting brief, any opposing party may request permission from the commission to file a brief in opposition to the objection.

(2) Briefs on objections to the dismissal of or refusal to dismiss a complaint may not exceed ten pages in length. Each party's brief should provide copies of any specific exhibits from the record which the party believes are essential for the commission to read. Requests for oral argument must be made in writing at the time of filing the first brief of each party. If the request is contained in a brief, the caption should indicate that oral argument is requested.

If a request for oral argument is timely made, ten minutes for each party will be reserved for oral argument during the commission meeting at which the objection will be considered.

(3) The objection will be considered at the next commission meeting after conclusion of the briefing schedule. Consideration of the objection will be based upon the written record unless oral argument is requested by a party and authorized by the commission. The commission may request that the parties present oral argument. The commission will review an objection under an abuse of discretion standard.

(4) If the commission sustains the objections to the dismissal of a complaint, it will reopen the case by remanding it to the department.

(a) If the complaint has not yet been informally investigated, and not more than 90 days (housing cases) or 120 days (non-housing cases) have passed since the date of filing, it will be remanded to the human rights bureau for investigation.

(b) If the complaint has been informally investigated, or if more than 90 days (housing cases) or 120 days (non-housing cases) have passed since the date of filing, it will be remanded to the hearings bureau to give notice of a hearing.



(5) If the commission affirms the dismissal of a complaint or sustains the objections to a refusal of the department to dismiss a complaint, it will notify the parties of its decision in writing within seven days. The charging party will have 90 days after receipt of the commission's order affirming the dismissal of a complaint to petition the district court for appropriate relief.

(6) If the commission affirms the refusal of the department to dismiss a complaint, it will remand the case to the department for further proceedings.

(7) A party may ask the district court to review a decision of the commission to remand a contested case to the department or to affirm or order the dismissal of the complaint.

(8) If the court later finds that it does not have jurisdiction over a contested case in which the complaint was improperly dismissed, then the charging party may apply to the department to reopen the complaint. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-204 and 49-2-509, MCA; NEW, 1998 MAR p. 3201, Eff. 12/4/98.)

Rules 24.9.1715 and 24.9.1716 reserved

24.9.1717 APPEAL OF FINAL ORDERS OF THE DEPARTMENT

(1) Following entry of a final order after a contested case hearing, pursuant to 49-2-505, MCA, parties shall have the opportunity to file an appeal, present briefs and present oral argument to the commission as provided in this rule.

(a) Once a final order is entered in a contested case, a party that wants to appeal shall provide notice of appeal to the commission, the department, and all parties within ten business days of its receipt of the final order. All appellants shall submit an original (or original copy) and six copies of all submissions for the record unless otherwise directed by the commission.

(2) The commission may reject or modify the conclusions of law and interpretations of administrative rules in the final order but may not reject or modify the findings of fact unless the commission first reviews the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The commission may accept or reduce any award or penalty but may not increase it without reviewing the complete record.

(a) Unless all parties stipulate otherwise, a party filing an appeal requiring commission review of the complete record, must file six copies of all contested case pre-hearing submissions, hearing exhibits, a transcript of the hearing, all post-hearing submissions and the final order.

(b) A party filing an appeal not requiring commission review of the complete record must file six copies of all portions of the contested case record, including the final order, required for the commission's review of the appeal.

(3) If an appellant does not intend to file a transcript of the hearing (or if the appellant intends for the commission to review a transcript and a transcript has been prepared and filed with the commission prior to issuance of the final order), the appellant must file and serve the appeal, a supporting brief and the portions of the record required for commission review of the appeal within 20 days of service of the final order. Any opposing party must file and serve an answer brief within ten days of service of the appeal and supporting brief. The appellant must file and serve any reply brief within ten days of service of the answer brief.

(4) If an appellant intends for the commission to review a transcript, and a transcript of the hearing has not been prepared and filed prior to issuance of the final order, the appellant must file a notice of intent to file an appeal stating that commission review of a transcript of the hearing is required.

(a) After the notice of intent to file an appeal is filed, the appellant must arrange for preparation of a transcript of the hearing at his or her own expense. The appellant must file an original and six copies of the transcript with the commission within 40 days of filing the notice of intent to file an appeal.

(b) If more than one party gives notice of intent to file an appeal, all parties filing an appeal which require review of a transcript of the hearing must share equally in the cost of the transcript and copies.

(c) The appellant must file the appeal, a supporting brief and the record within 20 days of the date of filing the transcript. Any opposing party must file and serve an answer brief within ten days of service of the appeal and supporting brief. The appellant must file and serve any reply brief within ten days of service of the answer brief.

(5) No enlargement of time will be allowed for compliance with any of the requirements of this rule except on a showing of good cause.

(6) Except upon stipulation of all parties, a transcript shall be prepared by an impartial person with no affiliation to any party and with no interest in the outcome of the contested case. A transcript shall be a verbatim and complete account of all proceedings on the record of the hearing and shall be in the form commonly accepted by the courts of record of this state. The preparer of a transcript shall certify that the transcript is a complete and accurate account of the stenographic or electronic recording of the hearing and that the preparer has no affiliation with any party and has no interest in the outcome of the contested case.

(7) If an appellant fails to file a brief in support of the appeal within the time provided by this rule, or within any extension of time granted, any opposing party may move to strike the appeal. If an opposing party fails to file a brief in opposition to appeal within the time provided by this rule, or within any extension of time granted, that party will not be heard at oral argument except by permission or at the request of the commission.

(8) When a party has timely filed an appeal of a final order and has timely filed a supporting brief, the commission will fix a date, not later than 120 days from the notice of appeal, to provide the parties an opportunity to present oral argument to the commission. Each party is allowed one-half hour of argument before the commission. Oral argument may be waived by the parties, except where it is requested by the commission.

(9) The chair of the commission, his or her designee, or a hearing examiner appointed by the commission may consider procedural motions and enter procedural orders as necessary for commission review.

(10) The commission may appoint a member of the commission for the purpose of conducting a prehearing conference prior to commission consideration of the appeal. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-204 and 49-2-505, MCA; NEW, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.1718 COMMISSION HEARINGS TO CONSIDER APPEALS (1) On the date fixed by the commission for oral argument upon the appeal of a party, a quorum of the commission shall hear oral argument.

(2) Any member of the commission who is absent at the presentation of oral argument may participate in deliberations and the entry of a final decision or order of the commission if he or she, where required, reviews the complete record of the contested case, including a recording or transcript of the oral argument of the parties.

(3) At the time of oral argument, and subject to the rule of the commission chair, any member of the commission may pose questions to a party, his or her representatives.

(4) At the request of a party or a member of the commission, the date of the hearing may be continued upon a showing of good cause, but not beyond the 120 days provided by law. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-204 and 49-2-505, MCA; NEW, 1998 MAR p. 3201, Eff. 12/4/98.)

24.9.1719 DETERMINATION OF APPEALS (1) The commission shall render a decision which affirms, modifies or reverses the final order or remands the matter to the department within 90 days of the hearing of the appeal.

(2) All orders of monetary relief must state the basis and method of computation for amounts awarded. If a party fails to propose findings of fact in support of his or her claim for specific monetary relief, the commission may require the parties to submit the necessary computation required for relief or may decline the relief.

(3) Regardless of the claims of the parties, the commission may grant all relief permitted by 49-2-506, MCA, including full affirmative relief in the public interest, subject to the provisions of 2-4-621, MCA with respect to an increase of award over that recommended in the final order. (History: 49-2-204 and 49-3-106, MCA; IMP, 49-2-204, 49-2-505, and 49-2-506, MCA; NEW, 1998 MAR p. 3201, Eff. 12/4/98.)